92-1687

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

PATRICIA A. GALLEGOS,

Petitioner,

v.

THE CITY AND COUNTY OF DENVER; FEDERICO PENA; WILLIAM ROBERTS; DAVID MILLER; KATHY ARCHULETA; ALLEGRA HAYNES; KEVIN MARCHMAN; LARRY FULLERTON; JOHN MROZEK; RUTH RODRIGUEZ; MICHAEL MUSGRAVE; RANDY ALEXANDER; RON YOUNGER; and GEORGE DOUGHTY,

Respondents,

and

KING HARRIS,

Defendant.

Petitioner's Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether discharge and termination claims are actionable under 42 U.S.C. §1981 after the decision of the Supreme Court in *Patterson v. McClean Credit Union.*

2. Whether discharge and termination claims are actionable under the right to enforce cotracts section of 42 U.S.C. §1981.

3. Whether the correct standards were applied to respondents' motion for summary judgment.

4. Whether the correct standards were applied regarding the affirmative defense of qualified immunity.

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PATRICIA A. GALLEGOS,

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THE CITY AND COUNTY OF DENVER; FEDERICO PENA; WILLIAM ROBERTS; DAVID MILLER; KATHY ARCHULETA; ALLEGRA HAYNES; KEVIN MARCHMAN; LARRY FULLERTON; JOHN MROZEK; RUTH RODRIGUEZ; MICHAEL MUSGRAVE; RANDY ALEXANDER; RON YOUNGER; and GEORGE DOUGHTY,

Respondents,

and

KING HARRIS,

Defendant.

Petitioner's Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

Patricia A. Gallegos petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals (App. 1-13) is attached hereto. This order was entered by the Court of Appeals on January 20, 1993 and is reported at 984 F.2d 358 (10th Cir. 1993). The order of the District Court following the mandate of the Court of Appeals, granting the respondents' motion for summary judgment is not reported but is attached hereto (App. 14-16). Other relevant orders of the District Court which are not reported are the Order dated April 11, 1991 (App. 17-18) and Memorandum and Order dated December 26, 1990 (App. 19-25) which are attached hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on January 20, 1993 and effectively disposes of all claims against the respondents and the Court's mandate to the District Court to grant respondents' motion for summary judgment constitutes a final order for purposes of appeal.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. §1981 provides as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to know others.

42 U.S.C. §1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. §1985(3) which provides as follows:

> **(3) Depriving persons of rights or privileges.** If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons

> engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. §2000d which provides as follows:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

STATEMENT OF THE CASE

Nature of the Case

The petitioner commenced this action below on April 11, 1989 against the City and County of Denver, former Mayor Federico Pena, former City Councilman William R. Roberts, David Miller, Kathy Archuleta, Allegra Haynes, Kevin Marchman, Larry Fullerton, John S. Mrozek, Ruth Rodriguez, Michael Musgrave, Randy Alexander, Ron Younger, George Doughty who were officials and/or employees of the City and County of Denver and King Harris, a private black contractor. On May 5, 1989 defendant Harris filed a motion to dismiss petitioner's complaint and on May 18, 1991 the respondents, including the City and County of Denver, filed a motion for extension of time within which to respond to petitioner's complaint. On May 31, 1991 the petitioner amended her complaint asserting nine claims for relief: First Claim, asserting a violation of 42 U.S.C. §1981 regarding the

termination of her employment and failure to change her position to one which enjoyed Career Service Authority status as previously agreed upon; Second Claim, asserting a violation of 42 U.S.C §1983 for violation of certain federal rights; Third Claim asserting a conspiracy against respondents Pena and Roberts and defendant Harris in violation of 42 U.S.C. §1985(3); Fourth Claim, asserting a violation of her rights under 42 U.S.C. §2000d; Fifth Claim, a state pendent cause of action of intentional infliction of emotional distress; Sixth Claim, a state pendent cause of action of intentional interference with contractual rights; Seventh Claim, a state pendent cause of action of outrageous conduct; Eighth Claim, a state pendent cause of action of defamation; and Ninth Claim, a state pendent cause of action for breach of contract. Motions to dismiss petitioner's first amended complaint were filed by defendant Harris on June 5, 1989 and by the respondents on June 6, 1989. Subsequent to briefing and oral argument the district court denied respondents' and Harris' motion to dismiss plaintiff's first claim for relief under 42 U.S.C. §1981 but limited the petitioner to presenting the evidence concerning the respondents' actions that prevented her from obtaining the change in her position to one enjoying Career Service Authority status. The district court dismissed petitioner's state pendent claims raised in her fifth, seventh, eighth and ninth claims for relief. On January 25, 1991 the respondents filed their answer to petitioner's first amended complaint and on January 29, 1991 defendant King Harris filed his answer to petitioner's first amended complaint. On March 6, 1991 the respondents and Harris filed motions for summary judgment. After briefing and oral argument, the district court on April 11, 1991 issued an order dismissing petitioner's first claim as to the respondent City

and County of Denver only, dismissing petitioner's second claim as to the respondent City and County of Denver; denying respondents' motion as to petitioner's third claim under 42 U.S.C. §1985(3); dismissing petitioner's fourth claim under Title VI and petitioner's sixth claim which was the state pendent claim of intentional interference with contractual rights. On April 29, 1991 the respondents filed a timely notice of appeal. The matter was briefed by the parties and the Court of Appeals issued an order stating that the Court would decide the matter without the benefit of oral argument. On January 20, 1993 the Court of Appeals reversed the district court's denial of respondents' motion for summary judgment and remanded the matter with directions that the district court enter summary judgment for the respondents.

Statement of Facts

The petitioner began her employment with the City and County of Denver (hereinafter the "City") on January 5, 1987 when she was appointed by respondent Pena as the Director of Affirmative Action for the City and County of Denver. One, and perhaps the most important of the charges which the petitioner received from respondent Pena was the responsibility to bring the Minority Business Enterprise and Women Business Enterprise Programs (hereinafter "MBE/WBE Programs") into compliance with applicable federal orders, rules and regulations of the Federal Aviation Administration (hereinafter the "FAA") and the office of the Secretary of the Department of Transportation. In fulfilling her employment responsibilities under this charge, the petitioner reviewed various reports of the FAA and the rules and regulations set forth in 49 CFR Parts 21 and 23 as well as other federal orders, rules and regulations. In addition, the petitioner reviewed the requirements of Ordinance 246, the City's

local affirmative action ordinance. Prior to the petitioner's employment, for a period spanning several years, the City had never been in compliance with the applicable rules and regulations of the federal government which it was compelled to follow as a recipient of federal financial assistance. In the several years prior to petitioner's employment as Director of Affirmative Action, the FAA had identified long-standing deficiencies in the entire development and implementation of the MBE/WBE Programs of the City. Prior to the petitioner's employment these programs had been administered by respondent Younger, a black male, as the Affirmative Action Officer for the City and County of Denver and others. Because of the chaotic state of the MBE/WBE Programs and the processes and procedures connected therewith, and the longstanding inability to comply with federal requirements, the petitioner was hired to supervise the entire operation including the employment activities of respondent Younger.

From the onset of petitioner's employment, respondent Younger was extremely hostile and antagonistic towards the petitioner and refused to cooperate and provide the necessary assistance to the petitioner in her effort to carry out the charge given to her by the respondent Mayor. Despite the hostile environment created by respondent Younger, the petitioner diligently set out to accomplish the mission of the Affirmative Action Office to get it into compliance to avoid the possible loss of federal funds for failure to do so. One of the first priorities was to revamp the certification procedures by which minority and women contractors were certified as eligible to bid on various City contracts. One of the more significant requirements of the applicable rules and regulations was that reliable and accurate information be provided regarding the ownership of various minority and women

contractors. The petitioner, with counsel and advice from the Office of the City Attorney for the City and County of Denver, and in consultation with various federal officials who monitored the City's MBE/WBE Programs, developed procedures to determine ownership of the various minority and women contractors and to fulfill the other requirements of the federal regulations. The procedures were approved by the office of the City Attorney for the City and County of Denver and found by the reviewing federal officials to be of "the highest integrity". One of the procedures required that the minority and women contractors furnish income tax information. Defendant King Harris and a few other black contractors refused to provide the necessary income tax information as required by the revamped and approved certification process. The other minority and women contractors supplied the requested tax information without resistance. In the past, when respondent Younger was in charge of the certification of minority contractors the failure to insist upon receiving this information was a key factor contributing to the problems regarding non-compliance with applicable federal regulations. After his refusal to provide the information requested under the newly-approved procedures, defendant Harris began a campaign to characterize the petitioner as being "anti-black" and without sufficient knowledge of the contracting business to properly administer the City's Affirmative Action Office. Defendant Harris, a longtime friend of respondent Roberts, then a councilman for the City and County of Denver, began to pressure the respondent Mayor, members of his staff and mayoral appointees to cause the removal of the petitioner from her position as Director of Affirmative Action Office. During the initial three to four months of the petitioner's employment, respondent Pena was in the midst of a campaign seeking reelection to his

second term as Mayor of the City and County of Denver. Respondent Roberts and defendant Harris approached respondent Pena and advised him that they would withhold whatever support they could muster in Denver's black community unless he terminated the petitioner from her position as Director of Affirmative Action. Ultimately, respondents Pena, Roberts, and defendant Harris reached an agreement where Roberts and Harris would provide the political support and Pena would terminate the petitioner's employment.

During the petitioner's tenure as Director of Affirmative Action, pressure was placed upon her from Roberts, Harris, the Mayor's staff and appointees to give special preference to defendant Harris' contracting firms and certain other black contractors. Despite these pressures the petitioner applied the approved processes and procedures regarding certification in a uniform manner without regard to race, sex or national origin because she was compelled to so do under the applicable city ordinance and the federal rules and regulations. On several occasions Roberts and Harris acknowledged, in a boastful manner, their agreement with the Mayor, communicating directly to the petitioner that she would ultimately be terminated from her employment with the City.

On December 18, 1987 respondent Pena advised the petitioner in the presence of respondent Rodriguez and others that she was to be terminated from her employment. Respondent Rodriguez, knowing full well that the petitioner had been doing an outstanding job as the Director of Affirmative Action, interceded on the petitioner's behalf and suggested an alternative solution that allowed the petitioner to remain in the employ of the City. Respondent Rodriguez suggested that the petitioner be transferred from her position as Director of Affirmative Action to a position entitled Director of Contract

Administration. The petitioner, being concerned about her job security based upon the manner in which the Mayor was about to terminate her employment after she had worked so diligently in her position, agreed to accept this as a viable compromise on the condition that respondents Pena and Rodriguez initiate an *existing* procedure to convert the position of Director of Contract Administration from a mayoral-appointed position to a Career Service Authority position with the understanding that she would be allowed to remain in the position for a minimum of at least one year, receive a substantial salary increase from her then present salary, and receive certain other benefits including an immediate and much needed vacation. The procedure to be followed was that respondent Rodriguez would initiate a memorandum to the Career Service Authority requesting that the plaintiff's position as Director of Contract Administration be converted to a Career Service Authority position and that the petitioner would prepare the necessary job description to accomplish this conversion. The position then would be advertised for applicants. While this well-established procedure was being followed, the petitioner would have the benefit of having worked in the position for a period of time and would, therefore, have the "inside track" for the position if she had to compete with others who might be interested in applying for the position. On at least three occasions in the past these same officials utilized this procedure to promote or hire other individuals. Respondent Rodriguez agreed to this as a viable compromise and respondent Pena then promised the petitioner that she would receive the position as well as the other considerations. He also requested that the petitioner agree not to speak to the press whatsoever concerning the circumstances of the transfer or his other existing concerns regarding the previous operation of the Affirmative

Action office. The agreement required that the petitioner would immediately go on vacation and return to work on the first working day of 1988 which she did. However, while on vacation, it was expected that the petitioner would assist, and she did, in preparing certain paperwork necessary to obtain the long-awaited finding by the FAA that the City was in compliance with applicable federal regulations. While on vacation, the petitioner authored one last document, respondent Pena's letter to the FAA dated December 24, 1987, to obtain the FAA's compliance finding and by letter dated December 30, 1987 the City's MBE/WBE Programs were found to be in compliance by the FAA as a result of the year-long efforts of the petitioner to accomplish this objective which was one of her original charges.

The petitioner upon her return from vacation, received the substantial salary increase as promised. The petitioner then contacted officials at the Career Service Authority to ascertain the precise procedures to accomplish the conversion of her position from a mayoral-appointed position to a Career Service Authority position. She was provided with sample job descriptions for comparable positions within the City which were Career Service Authority positions at the time. The petitioner then prepared the necessary memo, at the request of respondent Rodriguez, to initiate the process and provided it to her for her signature and transmittal to Career Service Authority. The petitioner then began working on drafts of the job description which was the next document required by the Career Service Authority conversion process. During the period of January to April 11, 1988 the petitioner was extremely busy performing a multitude of tasks and responsibilities in her position of Director of Contract Administration. After a considerable

period of time the petitioner had not heard from respondent Rodriguez regarding progress of the job conversion and contacted the Career Service Authority to see if the initiating memo had been forwarded to the Career Service Authority. She learned that it had not and then she inquired of respondent Rodriguez as to why this had not been done. After being given several dubious explanations and a suggestion that perhaps the memo had been lost, the petitioner prepared a second memo for respondent Rodriguez' signature and submission to the Career Service Authority. During this period of time the petitioner was experiencing various types of conduct from several of the respondents including Rodriguez which caused her to conclude that she was being pressured into resigning before her position could be converted to the Career Service status. During the first few months of 1988 the petitioner brought these matters to the attention of her sister, Michael S. Gallegos, who is an attorney licensed to practice law in the State of Colorado. Petitioner's sister contacted the Mayor's chief of staff, respondent David Miller to inquire regarding the status of the conversion of the petitioner's position to Career Service Authority status. During the four or five conversations between petitioner's sister and respondent Miller, certain promises were made by respondent Miller that he would look into the petitioner's concerns to see to it that they were addressed. During these conversations, the petitioner's sister also advised respondent Miller that the petitioner was being hounded by members of the local press for information concerning her transfer and a pending federal investigation of the operations of the affirmative action office prior to her appointment in January of 1987. During the last conversation between petitioner's sister and respondent Miller on April 6, 1988, he became

very irate and left the petitioner's sister with the impression that he believed the petitioner and she were threatening to go to the press with their concerns. Petitioner's sister attempted to call respondent Miller several times after the last conversation but he would not return her calls. Finally, petitioner's sister contacted respondent Miller's receptionist and asked her to communicate to him and assure him that she was not threatening to go to the press nor did the petitioner authorize her to do so.

On April 11, 1988, the petitioner was summoned to the office of respondent Miller in the presence of respondent Rodriguez and ordered to resign from her position by 3:00 p.m. that afternoon or be terminated. She was further advised by respondent Miller that if she did not resign, "we will make your life miserable." The petitioner then left the office of respondent Miller and attempted to reach her husband for counsel regarding the ultimatum issued to her by respondent Miller. Before the 3:00 p.m. deadline had expired, the Career Service Authority had been advised that she had resigned. On April 13, 1988 the petitioner received a letter advising her of the termination of her employment. The letter was dated April 11, 1988 and received in an envelope postmarked April 12, 1988. Respondents Miller and Rodriguez provided copies of the petitioner's termination letter to members of the press on April 11, 1988.

REASONS FOR GRANTING THE PETITION

Summary:

First, the petitioner asserts that her claim under 42 U.S.C. §1981 was not precluded by this Court's decision in *Patterson v. McClean Credit Union*, 491 U.S. 164 (1989). The decision in *Patterson* is very narrow in scope and should be applied only to claims of harassment. This

Court did not address in *Patterson* the issue of the applicability of 42 U.S.C. §1981 to claims of discriminatory discharges or terminations. The Tenth Circuit Court of Appeals improperly extended this Court's holding in *Patterson* to include such claims. See *Trujillo v. Grand Junction Regional Center*, 928 F.2d 973 (10th Cir. 1991). Termination claims are also actionable under the right to enforce contracts clause of 42 U.S.C. §1981 since termination of an employment contract is the most complete impairment of such right. It is clear that the Congress, with the enactment of the Civil Rights Act of 1991, intended that this Court's holding in *Patterson* be reversed and the law restored to its original state. The Congress by enacting this most recent statute clearly intended that §1981 is available to victims of discrimination in termination cases. In addition, the petitioner's claim under §1981 arose more than two months *before* the *Patterson* decision.

Second, in determining the respondents' motion for summary judgment, the Court of Appeals failed to allow the favorable inferences capable of being drawn from petitioner's evidence to which she was entitled as the non-moving party. The Court of Appeals failure to allow the petitioner the benefit of these inferences is contrary to established principles regarding summary judgment.

Third, the Court of Appeals incorrectly applied the standards regarding any potential entitlement to qualified immunity on behalf of the respondents.

ARGUMENT

I. DISCHARGE AND TERMINATION CLAIMS REMAIN ACTIONABLE AFTER THE DECISION OF THE SUPREME COURT IN *PATTERSON V. MCCLEAN CREDIT UNION.*

In *Patterson*, this Court attempted to define for the lower federal courts the scope of discriminatory conduct prohibited by 42 U.S.C. §1981. This decision has led a number of lower federal courts to narrow the coverage of the statute to hiring and promotion claims only thus excluding other claims such as termination claims. This view of §1981 is too restrictive and is not required by *Patterson* and a number of courts have held that the decision does not preclude actions involving discriminatory discharges and terminations from employment. See *Booth v. Terminix International, Inc.*, 722 F.Supp. 675 (D. Kan. 1989); *Birdwhistle v. Kansas Power & Light Co.*, 723 F.Supp. 570 (D. Kan. 1989); *Carroll v. Elliott Personnel Services*, 51 FEP Cases 1173 (D. Md. 1989) and *Gamboa v. Washington*, 716 F.Supp. 353 (N.D.Ill. 1989). See also the note of the Court of Appeals in *Jackson v. City of Albuquerque*, 890 F.2d 225, 236 n. 15 (10th Cir. 1989) and *Vance v. Southern Bell*, 863 F.2d 1503, n. 3 (11th Cir. 1989) indicating that "*Patterson* does not preclude a claim of racial harassment when the harassment causes the employee to stop working".

This Court's decision in *Patterson* does not preclude discharge or termination claims for several different reasons. First, the decision in *Patterson* did not mention or address discharge claims in any respect whatsoever and several courts have found this to be persuasive evidence that the Court did not intend to change existing precedent allowing such claims under §1981. See *Carroll v. Elliott Personnel, supra*, at 1175; *Greggs v. Hillman District Co.*, 719 F.Supp. 552, 554 (S.D. Tex. 1989), and *Hall v.*

County of Cook, 719 F.Supp. 721, 723 (N.D. Ill. 1989). Secondly, *Patterson* did not overrule or distinguish five decisions of this Court which had previously allowed discharge claims under §1981. See *Johnson v. Railway Express Agency*, 421 U.S. 454, 459-60 (1975); *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 237, 275 (1976); *Delaware State College v. Ricks*, 449 U.S. 250 (1980); *St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987) and *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987). Thirdly, this Court, in two decisions after *Patterson*, declined opportunities to extend its holding to removal and termination claims. See *Jett v. Dallas Independent School District*, 491 U.S. 701 (1989) and *Lytle v. Household Mfg., Inc.*, ___ U.S. ___, 110 S.Ct. 1331, 1336 n. 3 (1990). The 8th Circuit Court of Appeals in *Hicks v. Brown Group*, 902 F.2d 630 (8th Cir. 1990), later vacated and remanded *sub nom*, ___ U.S. ___, 112 S.Ct. 1255 (1992) also found it significant that the majority in *Patterson* took issue with substantial portions of Justice Brennan's opinion, dissenting in part, but did not object to his statement that §1981 continues to provide a cause of action for discriminatory discharge. For all these reasons, the Court of Appeals, initially, in *Hicks* declined to overrule the clear and undisputed precedent of that circuit allowing discharge claims under §1981. Similar application of §1981 had previously been allowed in decisions of the Tenth Circuit Court of Appeals. See *Whately v. Skaggs Companies, Inc.*, 707 F.2d 1129, 1139 (10th Cir. 1983) which involved a termination wherein the Court stated that the trial court correctly allowed a §1981 claim for such discrimination in employment. Principles of *stare decisis* compel the same result here. See *Patterson, supra*, 109 S.Ct. at 2370-71 where this Court declined to overrule *Runyon v. McCrary*, 427 U.S. 160 (1976) on *stare decisis* grounds. *Runyon* was the landmark decision of this Court which first recognized the

viability of claims of racial discrimination regarding the making and enforcement of contracts under 42 U.S.C. §1981. This Court declined to overrule *Runyon* even though some of the Justices believed that *Runyon* was decided incorrectly. There is no reason why the same should not be true concerning the allowance of discharge claims under §1981. *Patterson* did not preclude termination claims because nowhere in the decision does this Court criticize or cast doubt on the prior cases of its own that allowed discharge claims under §1981 or on the precedent of every circuit that has done the same. Since this Court declined to directly overrule *Runyon* on *stare decisis* grounds, it would, indeed, be strange to find that it indirectly or implicitly overruled the above-referenced cases or gave them less effect under the doctrine of *stare decisis* than had just be accorded *Runyon*. In *Patterson*, 109 S.Ct. at 2371, this Court also decided that the past interpretation of §1981 had not become outdated or unavailable.

Although this action does not include a claim under Title VII, it is anticipated that the respondents may raise the issue of the interaction between the two statutes. The existing precedent allowing discharge claims under §1981 does not conflict with the remedial scheme of Title VII. This argument was suggested and rejected in *Patterson* as a ground for overruling *Runyon*. *Id.* 109 S.Ct. at 2371. Some employees such as those working for companies with less than fifteen employees are not even covered by Title VII and §1981 is the sole remedy available to them. No conceivable conflict is present in those situations. Even where this is not the case, the 8th Circuit has discerned that the same consideration which led the Supreme Court to find §1981 to be consistent with Title VII in *Patterson* is applicable to the current context of allowing discharge to remain actionable under §1981.

Even if the principles of *stare decisis* do not prevent reconsideration of the past precedents allowing discharge claims under §1981, the Court in *Hicks* and several other courts have discerned that discriminatory discharge impedes the right to make contracts. In *Hicks*, the Court reasons that "because protection from racially motivated deprivations of contracts is essential to the full enjoyment of the right to *make* contracts, we hold that discriminatory discharge continues to be actionable under §1981". 902 F.2d at 638 (emphasis in original). Accepting the premise in *Patterson* that there is a difference between discrimination in the making of a contract on the one hand and discrimination after the formation of a contract in the conditions of employment on the other, the Court in *Hicks* found that discharge falls into the former category and not the latter when it stated:

> "Discharge is fundamentally different from racial harassment or discrimination in the terms or conditions of employment. An employee who is harassed or subjected to discriminatory terms or conditions of employment still receives the fundamental benefit of his or her employment contract – the employment itself – even though that employment may be unpleasant, degraded or obnoxious. In distinction, discriminatory discharge goes to the very existence and nature of the employment contract. A discriminatory discharge completely deprives the employee of his or her employment, the very essence of the right to make employment contracts.
>
> When construing §1981, we are mindful of our obligation to construe a statute in a fashion which gives meaningful effect to the rights it confers, not to negate them. *McCown v. Heidler*, 527 F.2d 204, 207 (10th Cir. 1975). In fact, we are required to generously interpret the Civil Rights Act of 1866, from which §1981 is derived,

'accord[ing] it a sweep as broad as its language'. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968) (*Jones*) (quoting *United States v. Price*, 383 U.S. 787, 801 (1966). We refuse to construe §1981 as prohibiting an employer from refusing to hire someone based on her race, but then permitting the discharge of that same employee because of her race a month or a year later. Such an absurd interpretation would allow discriminatory discharge to effectively annihilate the right to make contracts. The right to make contracts would be rendered virtually meaningless unless it encompasses the right to be free from discriminatory deprivation of such contracts. In order to give meaning to the right to make contracts free from discrimination, the right to be free from discriminatory discharge must be implied. See *Luria v. United States*, 231 U.S. 9, 24 (1913) (that which is clearly implied in a statute is as much a part of the law as what is expressed). Accordingly, we hold that discriminatory discharge directly affects the right to make contracts, and therefore is cognizable under §1981.

We believe that construing the right to make contracts as encompassing the right to be free from discriminatory discharge does not unduly strain the language of §1981. See *Patterson*, 109 S.Ct. at 2377. We do not deny that the right to make contracts is reasonably susceptible to an interpretation which does not extend its protection to prohibit post-formation discharge continues to be actionable under the right to make contracts when it totally deprives the victim of the fundamental benefit the right to make contracts was intended to secure – the contractual relationship itself. Indeed, the *Patterson* Court indicated that it is appropriate to examine post-formation conduct in certain circumstances to

determine whether the right to make contracts has been violated. See 109 S.Ct. 2376-77.

In *Hicks*, the 8th Circuit gave a painstaking and exhaustive review of the legislative history of §1981 and found that it was "sufficiently compelling to illuminate and redress our interpretation of §1981" that "the right to make contracts forbids discriminatory discharge". *Hicks, supra*. 902 F.2d at p. 643 n. 32 and p. 648. Notwithstanding that this decision was vacated and remanded *sub nom*, the reasoning is persuasive and applicable here.

The argument for prohibiting a cause of action for discharges under §1981 is the result of a fundamental misreading of the *Patterson* decision. The courts that have precluded actions for discharges have mistakenly thought that *Patterson* made all discrimination *after* the formation of the original employment contract unactionable. Only isolated passages support this position and a reading of the entirety of the decision does not support this position.

In most instances, as a matter of fact and experience, a discharge involves both the termination of a contractual relationship and the refusal to enter into a new contract. When an employer fires an employee, it is clearly the employer's intent not to employ the worker in the position from which he or she was fired. Although one could imagine the rare situation when an employer, who after terminating its contract with an employee, would be willing to immediately rehire him when the employer seeks to reduce the worker's continuous seniority or to rehire the worker at a different salary. This is not the normal purpose for terminating an employee. Ordinarily, discharge reflects an unwillingness on the part of the employer to employ the employee under any circumstance. To be certain, most employees who have been terminated have demonstrated that they are desirous of their former jobs or they would not have gone to work on

the day that they were dismissed. Again, one can conceive of a discharged employee who would not want his or her job back but that would be the exception. Unless the employee manifests some change of position, an employer knows at the time that it discharges the employee that the employee still desires to have his or her job.

Thus, a discharge will ordinarily involve two contracts: One, the old contract that the employer is terminating and two, the new contract which the employer refuses to enter into with the employee. This is illustrated by a simple example. Suppose that on a Sunday night an employer decides that it will no longer hire Hispanic persons and places a large sign in the front of its business reading "No Hispanic persons will be hired at this office." The next day two Hispanic persons show up at the office one of whom had previously worked at the office and had been dismissed because of his national origin and, the other, who was seeking new employment. Both of them are denied employment by the employer because of their national origin. It would indeed be strange if only the new applicant but not the previously dismissed employee had a claim under §1981 since they are both seeking the same thing, employment on Monday, and both are being denied employment for the same reason.

II. ALTERNATIVELY, DISCHARGE AND TERMINATION CLAIMS ARE ACTIONABLE UNDER THE RIGHT TO ENFORCE CONTRACTS SECTION OF 42 U.S.C. §1981.

Discharges and terminations motivated by racial or ethnic animus remain actionable under the enforcement clauses of §1981. See *Rathjen v. Litchfield*, 878 F.2d 836, 841 (5th Cir. 1989); *Jordan v. U.S. West Direct Co.*, 716 F.Supp.

1366, 1368-69 (D.Colo. 1989); *Birdwhistle v. Kansas Power & Light Co., supra,* and *English v. General Development Corp.,* 717 F.Supp. 628, 630 (N.D. Ill. 1989). Also compare *Vance v. Southern Bell,* 863 F.2d 1503, 1509 n. 3 (11th Cir. 1989) with *Sherman v. Burke Contracting Co., Inc.,* 891 F.2d 1527, 1535 (11th Cir. 1990). The termination of an employment contract is the most complete impairment of the right to enforce contracts that one can imagine. With a discharge or termination, there is no longer any contract to enforce and the "right to enforce" is preempted in its entirety. If, for example, an employee requested that the employer cease discrimination in promotions in an effort to enforce his employment contract which was supposed to be non-discriminatory, discharge or termination of the employee as a response to his request for non-discriminatory promotions would impair the right to enforce his contract by destroying the very thing he sought to enforce, the contract itself. To put it simply, there can be no right to enforce a contract if the employer is free to terminate the contract whenever the employee requests that it be honored or enforced. This appears to be a matter of common sense.

The decision in *Patterson* states that §1981 "expressly prohibits discrimination only in the making and enforcement of contracts". *Id.* 109 S.Ct. at 2372. This Court further held that the "right to enforce" provisions of the statute "covers wholly private efforts to impede access to the courts or obstruct non-judicial efforts of adjudicating disputes about the force of binding obligations, as well as discrimination by private entities such as labor unions, and enforcing the terms of a contract". *Id.* 109 S.Ct. at 2372. There are several scenarios in which a discharge or termination can meet these requirements. First, consider an employer who makes a non-discriminatory contract with its Hispanic employee such that it does not violate

the "making" provision of §1981 but, who in fact, discriminates in the post-formation time frame. If the employee opposes that discrimination by complaining, he would be seeking to enforce his contract which had no discriminatory terms within it. If the employer terminates that employee because of his effort to enforce his contract, or otherwise retaliated or harassed him because of it, then it would have impaired the employee's right to enforce his contract and his access to non-judicial methods of enforcement of such a contract. In such a case, an informal complaint which is not a term of the employment contract involves "access to non-judicial methods of enforcement". Such a demand for performance should be an integral part of any scheme of contract enforcement because it is the policy of contract law, and the law generally, to ensure performance through informal negotiations or adjustments between parties and efforts at mitigation of damages by taking the quickest and most efficient action to avoid injury.

III. STANDARDS APPLICABLE TO MOTIONS FOR SUMMARY JUDGMENT WERE NOT APPLIED.

Fed.R.Civ.P., Rule 56(c) states that summary judgment is proper only when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Federal courts are entirely in agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts which would entitle him to judgment as a matter of law. See *Weinberger v. Hynson, Westcott & Dunning,* 412 U.S. 609 (1973) and *Adickes v. S.H. Kress & Co.,* 398 U.S. 144 (1970). Furthermore, before summary judgment may enter there must be no doubt from the evidence with all inferences drawn in favor of the non-moving party that no genuine issue of

material fact remains for trial and that the moving party is entitled to judgment as a matter of law. See *Bee v. Greaves*, 744 F.2d 1287, 1296 (10th Cir. 1984) and *Hutton v. Foremost Financial Service Corp.*, 724 F.2d 112, 116 (10th Cir. 1983). To satisfy the burden placed upon the party bringing the motion, the movant must make a showing that it is *quite clear* what the truth is and that excludes any real doubt as to the existence of any genuine issue of material fact. See *Pollar v. Columbia Broadcasting System*, 368 U.S. 464 (1962) and *Adickes v. S.H. Kress & Co., supra.* In her brief opposing the respondents' motion for summary judgment before the Court of Appeals the petitioner submitted a detailed affidavit containing 122 paragraphs. In its opinion the Court of Appeals inappropriately and without explanation gives great weight to the assertions of the respondents while giving little weight or credence to the assertions set forth in the petitioner's affidavit.

At page 3 of its opinion the Court of Appeals indicates that a major requirement of the position of Director of Affirmative Action was "good public relations" and indicates that the petitioner did not refute it. In her affidavit the petitioner clearly disputes these incorrect assertions and clearly pointed out that the primary charge for the position was to bring the affirmative action program of the City and County of Denver into compliance with the applicable federal regulations which the petitioner did, in fact, accomplish.

At page 3 of its opinion the Court of Appeals made reference to respondents' assertions that the "complaints" continued to be brought against the petitioner. The petitioner's affidavit clearly indicates that her actions and the procedures which she implemented to effectuate the necessary compliance were guided by counsel from the city attorney's office for the City and County of Denver and officials of the Federal Aviation Administration who were

monitoring the City and County of Denver's compliance in its affirmative action effort. In her affidavit the petitioner acknowledged that there was a handful of black contractors who were unhappy with her certification requirements to be eligible to compete as a minority contractor and submitted as evidence in opposition attachments to her affidavit petitions containing the names of numerous minority and women contractors and other minority persons who were praising her efforts to bring the affirmative action program into compliance. In addition, the complaints of a few contractors do not constitute evidence of a lack of good public relations.

At page 3 the Court of Appeals referred to a claim that the petitioner's sister, a Denver attorney, threatened the mayor to "go to the press if certain promises were not kept". In reply the petitioner submitted the affidavit of her sister indicating that no such threat was ever communicated nor was one ever authorized by petitioner.

Finally, the Court refers to the affidavit of respondent Pena who indicated that he did meet with respondents Roberts and Harris who complained to him about petitioner's performance but denied any conspiracy to fire the petitioner or preventing her from obtaining a new position. In her opposition affidavit the petitioner points out numerous times where several of the respondents communicated to her that a "deal" was struck to eliminate her from the employment rolls of the City and County of Denver by respondents Pena, Roberts and defendant Harris.

The Court of Appeals indicated that the petitioner had abandoned her claim of termination from the affirmative action position which is not the case. At the time that the district court entered its order that the termination was not actionable under 42 U.S.C. §1981 but that the petitioner's attempt to obtain the director of contract

compliance position was actionable, the order of the district court was not a "final" order disposing of all claims which would make the entire case appealable. The issue of qualified immunity was the only issue that went before the Court of Appeals and the petitioner did not abandon anything. The Court of Appeals also made reference that in regards to the Director of Contract Compliance position that the petitioner had presented no evidence that the respondent mayor or any other respondent had the authority "or ability" to circumvent certain procedures for the filling of positions where the status was changed from appointed to career service status. In paragraph 22 of her affidavit submitted to the Court of Appeals the petitioner pointed to three specific individuals who were either promoted or given positions contrary to the established rules by these City officials. The bottom line is that the Court of Appeals failed to allow reasonable inferences to be drawn from the assertions of the petitioner as set forth in her affidavit in opposition to the respondents' motion for summary judgment. Had the Court of Appeals given such reasonable inferences the critical issues in this case clearly would be at issue and genuine material facts would remain. It is very apparent in this case that credibility was a determining factor to establish the existence of a material fact and in such instances summary judgment is inappropriate when differing inferences can be drawn from conflicting evidence particularly when credibility is at issue. See *Celotex v. Catrett,* 477 U.S. 316 (1986) and *Romero v. Union Pacific R.R.,* 615 F.2d 1303 (10th Cir. 1980).

IV. INCORRECT STANDARDS REGARDING QUALIFIED IMMUNITY WERE APPLIED.

In its opinion, the Court of Appeals held that the district court was incorrect in its reasoning that it could not, at the pleading stage, decide issues regarding the qualified immunity defense. The Court of Appeals reasoned that the issue of qualified immunity concerns a defense against suit not a defense against having to go through the rigors of a trial. The Court further went on to state that the petitioner was given full and fair opportunity to present any evidence which she had to defeat the respondents' motion for summary judgment. The fact of the matter is that the trial judge may have been incorrect in his reasoning that the case should somehow be sorted out at the time of trial after the petitioner presented her case. The petitioner would agree with the Court of Appeals that determining issues of qualified immunity should not be reserved until the time of trial but fundamental fairness should have permitted the petitioner to engage in some discovery, when it is clear that there were potential genuine issues which needed further development when the motion for summary judgment was being determined by the trial court. The petitioner was not given the opportunity to do so in this case. Discovery was suspended until the determination made on the qualified immunity question. Once it was clear that there were potential genuine issues of material fact the petitioner should have been allowed to proceed with some limited discovery and the trial judge was correct in his initial approach which would have led to some discovery but perhaps incorrect in his reasoning that the sorting out or the distilling process of eliminating or discussing of some of the claims against some of the respondents had to be made at the close of petitioner's evidence at trial.

To withstand the defense of qualified immunity on a motion for summary judgment the non-movant must show

sufficient facts to show that the respondents' conduct violated the law and that the law was clearly established at the time the violation occurred. After the petitioner meets this initial burden then the respondents are required to go forward to show that there is no genuine issue of material fact. The Court of Appeals here basically held that the petitioner could not establish that the respondents violated the law and could not establish that the law was clearly established at the time the violation occurred citing *Harlow v. Fitzgerald,* 457 U.S. 800 (1982) and *Mitchell v. Forsyth,* 472 U.S. 511 (1985).

However, in her complaint the petitioner contended that respondents discriminated against her because of her national origin and in retaliation for her attempts to follow federal anti-discrimination laws and pointing out deficiencies in the affirmative action program which existed at the time of her initial appointment. At the time of her termination in April of 1988, some fourteen months before the *Patterson* decision (June 15, 1989), the petitioner clearly had an actionable claim under §1981 under the existing case law. The second part of the *Harlow* test – the law being clearly established – was met at the time of the actions.

The Court correctly stated that substantive rights are not created under 42 U.S.C. §§1983 and 1985(3) and that the underlying statute must exist to create such a right. The Court further reasoned that the underlying claim was 42 U.S.C. §1981 and incorrectly concluded that this approach must fail because termination claims were not actionable under 42 U.S.C. §1981 in accordance with this Court's decision in *Patterson.*

The Court incorrectly reasoned that neither the petitioner's removal from the affirmative action position nor her termination was actionable under that statute. The Court reasoned further that the only issue thus remaining

was whether or not the respondent Mayor's failure to take steps to have the petitioner's Director of Contract Administration position violated petitioner's rights under §1981. The Court incorrectly determined that the petitioner was not "entitled" to such a position and that there were definite guidelines for the creation, application and qualifications for the position which prevented the mayor from circumventing those procedures. As pointed out above, the Court concluded that the petitioner had presented no evidence to indicate that the Mayor had the authority "or ability" to circumvent those procedures. As also indicated above, the petitioner clearly pointed out the fact that officials of the City and County of Denver had on three specific occasions utilized the conversion procedure to ensure that the "preselected" persons actually received the positions. There was an established process to accomplish the conversion and the petitioner simply wanted respondents to fulfill their agreement and initiate the process to accomplish the conversion. Instead, she was terminated by respondent Pena thus fullfilling his agreement with respondents Roberts and defendant Harris.

CONCLUSION

The petitioner submits that she has stated a legitimate basis for this Court accepting the petition for writ of certiorari. The resolution of the issues raised by the petitioner would add to the body of decisional law that would be of benefit to those individuals bringing an action under 42 U.S.C. §1981, 1983, 1985(3). To allow this case to stand in its present posture would be a clear departure from the sound applications of principles of *res judicata*. For the reasons and arguments set forth above,

the petitioner submits that the petition for writ of certiorari should be granted to afford the petitioner a fair opportunity to develop all the issues for this Court's consideration.

Dated this 19th day of April, 1993.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

PATRICIA GALLEGOS, Plaintiff-Appellee,	)	
v.	)	No. 91-1169
CITY AND COUNTY OF DENVER; FEDERICO PENA; WILLIAM ROBERTS; DAVID MILLER; KATHY ARCHULETA; ALLEGRA HAYNES; KEVIN MARCHMAN; LARRY FULLERTON; JOHN MROZEK; RUTH RODRIGUEZ; MICHAEL MUSGRAVE; RANDY ALEXANDER; RON YOUNGER; GEORGE DOUGHTY, Defendants-Appellants,	)	
KING HARRIS, Defendant.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
(D.C. No. 89-S-619)

(Filed Jan. 20, 1993)

Submitted on the briefs:

Paul A. Baca, Denver, Colorado, for Plaintiff-Appellee.

Patricia L. Wells, City Attorney, and Darlene M. Ebert, Assistant City Attorney, Denver, Colorado, for Defendants-Appellants.

Before MOORE and TACHA, Circuit Judges, and SAFFELS,** Senior District Judge.

TACHA, Circuit Judge.

Plaintiff-appellee Patricia A. Gallegos was appointed by Denver Mayor Federico Pena as Director of Affirmative Action on January 5, 1987. She was a nontenured political appointee serving at the pleasure of the Mayor. She held this position until January 1, 1988, at which time she was removed as Director of Affirmative Action and placed in the position of Deputy Manager of Public Works for Finance Administration, another nontenured appointment. Plaintiff held this position for three months until her termination by the mayor on April 11, 1988.

Following her termination, plaintiff brought this action[1] against defendants-appellants City and County of Denver, Mayor Federico Pena, various city officials, and King Harris, a Denver businessman, claiming civil rights

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** Honorable Dale E. Saffels, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

[1] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

violations under 42 U.S.C. §§ 1981, 1983, 1985(3), and 2000d, as well as several state tort claims. In her first amended complaint, plaintiff claims that her termination was the result of discriminatory animus based on her sex and national origin; that at the time she was removed as Director of Affirmative Action, the mayor promised her that her new position would be made a Career Services Authority position with all the attendant benefits, including the job security not afforded by her appointed position; and that Mayor Pena, William Roberts, and King Harris entered into a conspiracy to terminate her and deny her the career services position.

In response, defendants claim that immediately following plaintiff's appointment, the mayor's office began to receive complaints regarding her inability to work with the minority community, her staff, and the minority contractors. Defendants contend, and plaintiff does not refute, that it was explained to her when she was appointed that a major requirement of the position was an ability to engage in good public relations with the community. In September 1987, the mayor confronted plaintiff regarding these complaints, and she was asked to respond to the complaints and to improve her relationship with the community within ninety days.

The complaints apparently continued and the problems escalated until December 1987, when the mayor removed plaintiff from the affirmative action position and transferred her to the public works position, allegedly promising to take the necessary steps to elevate the new position to Career Services Authority status. Defendants claim that in April 1988, plaintiff's sister, a Denver attorney, telephoned the mayor's office and

threatened to "go the press" if the alleged promise to create a career services position for plaintiff was not kept. It was at this point that the mayor terminated plaintiff.

Plaintiff claims that she heard from various people in the mayor's office that there was a "deal" among those close to the mayor, the mayor, and Mr. King to fire her in exchange for political support for the mayor's second-term candidacy. Mayor Pena, in his affidavit in support of defendants' motion for summary judgment, acknowledged that Roberts and Harris, as well as numerous other people, had complained to him about plaintiff's job performance and requested her removal, but denied any agreement or conspiracy to fire plaintiff or prevent her from obtaining a position secured by career services.

Plaintiff brought her §§ 1981 and 1983 claims against all of the named defendants. Plaintiff's § 1985(3) conspiracy claim was directed at defendants Pena, Roberts, and Harris. Defendants Alexander, Doughty, Fullerton, Haynes, Marchman, and Younger were in positions either subordinate to plaintiff or otherwise had no authority to make employment decisions regarding plaintiff. Plaintiff's contention that certain of the defendants enjoyed the mayor's confidence does not translate into employment decision authority. On appeal, plaintiff does not discuss, with any specificity, a majority of the individual defendants or their perceived culpability in her alleged wrongful termination.

The defendants filed a motion to dismiss plaintiff's complaint as failing to state a claim for relief under Fed. R. Civ. P. 12(b)(6), and claimed qualified immunity for the

individual city officials. The district court denied defendants' motion to dismiss plaintiff's §§ 1983, 1985(3), and Title VI claims, but limited plaintiff on the § 1981 claim to presenting evidence as to whether she was prevented from obtaining a new position under the Career Services Authority. The court dismissed plaintiff's pendent state claims, except for her sixth claim insofar as it represented a restatement of plaintiff's § 1981 claim. The district court did not address the individual defendants' claims of qualified immunity, reasoning:

> The Municipal Defendants have also raised additional issues such as employment-at-will and qualified immunity as grounds for their Motion to Dismiss. These defenses are necessarily related to facts not yet established at the pleading stage and cannot properly be decided on a motion to dismiss.

Appellants' App. at 27.[2]

Defendants subsequently filed a motion for summary judgment, again claiming that the individual defendants were entitled to qualified immunity on the remaining claims.[3] Following a hearing, the district court dismissed

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[2] We note that this reasoning is incorrect. A defendant can raise the qualified immunity defense under Fed. R. Civ. P. 12(b)(6) or in a motion for summary judgment. *Worman v. Jordan*, 958 F.2d 332, 334 n.2 (10th Cir. 1992). A court cannot avoid reaching the legal issue of qualified immunity by framing the question as factual. *Pueblo Neighborhood Health Ctrs., Inc. v. Losavio*, 847 F.2d 642, 646 (10th Cir. 1988).

[3] King Harris filed a separate motion for summary judgment which also was denied by the district court. Defendant Harris does not appeal this decision.

all claims as to the City and County of Denver, and dismissed plaintiff's Title VI claim.[4] The district court denied summary judgment on plaintiff's §§ 1981, 1983, and 1985(3) claims. Again, the district court failed to address defendants' claim of qualified immunity, stating:

> As far – well, and perhaps I should say for purposes of this order, I did not address the issue of qualified immunity, because I think there are factual issues remaining there, so as to the qualified immunity issue, I know you addressed that in your motion. I'm denying the motion with respect to the qualified immunity. Obviously, that goes only to the individual defendants. The city wouldn't have qualified immunity anyway.
>
> Okay. So I'm not going to do anything with those individual defendants. I guess we sort them out at the conclusion of the plaintiff's case, but all I can say to the plaintiff is, she had better have some evidence at the time of trial as to these individual defendants, or she better drop them between now and trial if she can't produce any evidence. And Mr. Baca's a good lawyer and he knows what evidence it's going to take with respect to these individual defendants to overcome the qualified immunity doctrine, and we're all well familiar with the mandates of the cases on qualified immunity with respect to the fact that they must show – and I recognize the Court should look at that on summary judgment, but as far as the individual defendants,

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[4] The transcript of the summary judgment hearing indicates that plaintiff, at that time, withdrew her sex discrimination claim. *See* Appellants' App. at 311, 317.

> I'm just not inclined to sort out as to each individual defendant.

Appellants' App. at 358-59.

To withstand the defense of qualified immunity in a summary judgment motion, "plaintiff must produce facts 'sufficient to show both that the defendant's alleged conduct violated the law and that the law was clearly established when the alleged violation occurred.' " *Bruning v. Pixler*, 949 F.2d 352, 356 (10th Cir. 1991) (quoting *Pueblo Neighborhood Health Ctrs., Inc. v. Losavio*, 847 F.2d 642, 646 (10th Cir. 1988)), *cert. denied*, 112 S.Ct. 1943 (1992). *Only after* plaintiff has met this initial burden does the burden shift to defendants to prove that no genuine issue of material fact exists. *Losavio*, 847 F.2d at 646.

This court has held that the question of whether the law was clearly established at the time of the alleged violation is a purely legal question, and cannot be avoided by "framing it as factual." *Workman v. Jordan*, 958 F.2d 332, 336 (10th Cir. 1992); *see also Siegert v. Gilley*, 111 S.Ct. 1789, 1793 (1991) (a decision on the "purely legal question" of qualified immunity permits a defendant to avoid the expense and inconvenience of a trial on the merits). A successful claim of qualified immunity allows a public official to avoid the burdens of discovery and litigation, as well as liability. *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982). "The entitlement [to qualified immunity] is an *immunity from suit* rather than a mere defense to liability; . . . it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Consequently, when the qualified immunity defense is raised in a summary judgment motion, the

defendant should be spared the burden of going forward, unless and until the plaintiff is able to meet the burden of establishing that the defendant's alleged actions violated clearly established law. *Powell v. Mikulecky*, 891 F.2d 1454, 1457 (10th Cir. 1989).

Defendants' appeal in this case is not from an order of the district court denying summary judgment based on qualified immunity, but rather from an order denying summary judgment and postponing a decision on the qualified immunity question until trial. *See Workman*, 958 F.2d at 335. In essence, the district court in this case is requiring the defendants to go to trial before determining whether or not they are entitled to qualified immunity. This illustrates the kind of undermining of the purpose of qualified immunity which the Supreme Court seeks to avoid in *Harlow* and *Mitchell*. Because there is adequate basis in the record to determine that plaintiff, having a full and fair opportunity to do so, failed to meet her burden of showing that the actions of the defendants were in violation of clearly established law of which a reasonable person would have been aware, we determine that the defendants are entitled to judgment as a matter of law based on qualified immunity.

DISCUSSION:

In her complaint, plaintiff contends that the defendants discriminated against her "because of her national origin and/or in retaliation for her attempts to follow federal anti-discrimination laws and denied her rights to equal employment opportunity." Appellants' App. at 12. Plaintiff argues that her right to equal employment

opportunity was violated by a discriminatorily motivated conspiracy to prevent her from obtaining a Career Services Authority position with the City and County of Denver.[5]

Sections 1983 and 1985(3) of the Civil Rights Acts do not create substantive rights. *See Trujillo v. Grand Junction Regional Ctr.*, 928 F.2d 973, 977 (10th Cir. 1991) (quoting *Tafoya v. Adams*, 816 F.2d 555, 558 n.5 (10th Cir.), *cert. denied*, 484 U.S. 851 (1987)) (§ 1983 " 'creates only a remedy for violations of rights secured by federal statutory and constitutional law' "); *Dixon v. City of Lawton*, 898 F.2d 1443, 1448 (10th Cir. 1990) (§ 1985(3) does not provide a substantive right, but is a procedural statute which provides a remedy for a deprivation of an existing right). Although difficult to discern with any certainty, it appears that plaintiff is asserting that a violation of her rights under § 1981 underlies her §§ 1983 and 1985(3) claims. However, a claim for discriminatory discharge cannot be brought under § 1981. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 176-78 (1989); *see also Trujillo*, 928 F.2d at 975 (§ 1981 does not provide a remedy for racial discrimination in employment conditions, only in the making and enforcing of contracts). None of the incidents related by plaintiff in support of her contention that she was a victim of discriminatory actions during her tenure as Director of Affirmative Action involves her

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[5] Although plaintiff argued in the district court that she was the victim of discriminatory discharge in her removal from her position as Director of Affirmative Action, she appears to abandon this argument on appeal, and contends only that she was discriminated against as to the career services position which was allegedly promised to her.

right to make or enforce a contract. *See Patterson*, 491 U.S. at 179-80.[6] Therefore, neither plaintiff's removal from the affirmative action position nor her April 1988, termination by the mayor is actionable under § 1981. Consequently, the only issue thus remaining is whether the mayor's failure to take the steps necessary to have plaintiff's Public Works position brought under the Career Services Authority was motivated by discriminatory animus in violation of plaintiff's § 1981 rights.

When the mayor relieved plaintiff of her duties as Director of Affirmative Action, an appointed position, and placed her as a deputy director in Public Works, another appointed position, he allegedly promised her a vacation, a salary increase, and that he would initiate the process necessary to make the Public Works position a Career Services Authority position. He allegedly assured her that, because she was already performing the duties and responsibilities of the position, she would have an "inside track" in competing for the position once it received career services status. *See* Appellee's Ans. Br. at 8. Plaintiff received the vacation time and the salary increase, but claims that, at the time of her termination three months later, no action had been taken by the mayor, or anyone on his staff, to implement the procedures necessary to create a career services position.

Plaintiff does not refute the existence of very definite guidelines for the creation of, and application and

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[6] Insofar as plaintiff may have any actionable claim, we agree with defendants that her claims would be more appropriately brought and decided under Title VII of the Civil Rights Act. *See Patterson*, 491 U.S. at 180-81.

qualification for, Career Services Authority positions with the City and County of Denver. Plaintiff also presents no evidence to indicate that the mayor, or any other defendant, had the authority or ability to circumvent these procedures.

Plaintiff further concedes that, pursuant to the charter of the City and County of Denver, as an appointee of the mayor, she served at will and could be terminated by the mayor without cause. However, she continues to assert that the mayor's alleged "promise" to put the mechanism in motion to create a career services position, for which she may be qualified, created a constitutionally protected property interest. We do not agree. *See, e.g., Driggins v. City of Oklahoma City,* 954 F.2d 1511, 1515 (10th Cir.) (persons lacking authority to deviate from city charter provisions cannot create protected property interests by "mutually explicit understandings"), *cert. denied,* 113 S.Ct. 129 (1992).

"A property interest protected by the due process clause results from a legitimate claim of entitlement created and defined 'by existing rules or understandings that stem from an independent source such as state law.' " *Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence,* 927 F.2d 1111, 1116 (10th Cir. 1991) (quoting *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972)). Accordingly, under Colorado law, in order for a person to have a property interest in a benefit such as employment, the person "must have more than an abstract need or desire for it and must have more than a unilateral expectation of it. Instead, he must have a legitimate claim of entitlement to it." *Wilkerson v. State,* 830 P.2d 1121, 1124 (Colo. Ct. App. 1992). There is nothing to indicate that plaintiff had a

legitimate claim of entitlement to a not yet existing career services position or that the mayor's promise regarding the steps he would take to create the position produced anything more than a future expectation.

Plaintiff asks this court to "apply a common sense approach" to a determination of whether she has established a prima facie case of discrimination. *See* Appellee's Ans. Br. at 18-19. However, plaintiff's allegations that the delay in creating a career services position for her was in retaliation for her refusal to favor black contractors while in the affirmative action office and because of her Hispanic origin are vague, conclusory, and fail to satisfy plaintiff's burden of persuasion. *See Patterson,* 491 U.S. at 186-87 (plaintiff must prove she applied for and was qualified for a position which was subsequently filled by a white person). Consequently, even if we could recognize a protected property interest in the mayor's future "promises," plaintiff's arguments would fail.

As stated above, government officials are entitled to a grant of qualified immunity unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. at 818. The "objective reasonableness" standard set forth in *Harlow* often rests on a determination of whether the defendant's conduct can be traced to the subjective element of impermissible motive or intent. *Lewis v. City of Fort Collins,* 903 F.2d 752, 755 (10th Cir. 1990). Even if we accept all of plaintiff's facts as true, we can discern no evidence of discriminatory animus in the actions of any of the defendants which can be tied to plaintiff's failure to obtain a career services position.

In addition, plaintiff has not established, by either direct or circumstantial evidence, that there was a meeting of minds or agreement among certain of the defendants, discriminatorily motivated, to deprive her of equal protection. *See Abercrombie v. City of Catoosa,* 896 F.2d 1228, 1230 (10th Cir. 1990) ("A civil conspiracy requires the combination of two or more persons acting in concer"); *Dixon,* 898 F.2d at 1447 ("§ 1985(3) requires proof that a conspirator's action was motivated by a class-based, invidiously discriminatory animus"). Without such evidence, even a "common sense approach" would not give rise to the inference that a discriminatorily motivated conspiracy existed which acted to deprive plaintiff of equal protection. *See General Bldg. Contractors Ass'n v. Pennsylvania,* 458 U.S. 375, 391 (1982) (§ 1981 claim requires a showing of purposeful discrimination); *Batson v. Kentucky,* 476 U.S. 79, 93 (1986) (in order to establish an equal protection violation, plaintiff must demonstrate purposeful discrimination).

In sum, plaintiff has failed to meet her burden of establishing any violation of clearly established law in the mayor's failure to fulfill the "promise" to create a position for her, or for that matter, in the circumstances leading up to and surrounding her termination. Therefore, defendants should have been granted qualified immunity on plaintiff's §§ 1981, 1983, and 1985(3) claims.

Accordingly, we REVERSE the district court's denial of defendant-appellants' motion for summary judgment on qualified immunity grounds, and REMAND this case with directions that the district court enter summary judgment for the defendant-appellants as outlined above.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel B. Sparr

Civil Action No. 89-S-0619

PATRICIA A. GALLEGOS

Plaintiff,

v.

CITY AND COUNTY OF DENVER, FEDERICO PENA, WILLIAM ROBERTS, DAVID MILLER, KATHY ARCHULETA, ALLEGRA HAYNES, KEVIN MARCHMAN, LARRY FULLERTON, JOHN MROZEK, RUTH RODRIGUEZ, MICHAEL MUSGRAVE, RANDY ALEXANDER, RON YOUNGER, GEORGE DOUGHTY, and KING HARRIS,

Defendants.

ORDER GRANTING SUMMARY JUDGMENT

(Filed MAR 5 1993)

THIS MATTER comes before the court on the mandate from the Tenth Circuit Court of Appeals, filed with this court on March 3, 1993. The Tenth Circuit reversed this court's denial of the Defendant-Appellants' motion for summary judgment on qualified immunity grounds and remanded the case with directions that the district court enter summary judgment for the Defendant-Appellants as outlined in the opinion. Accordingly, IT IS ORDERED:

1. Summary judgment is hereby entered in favor of Defendants City and County of Denver, Federico Peña, William Roberts, David Miller, Kathy Archuleta, Allegra

Haynes, Kevin Marchman, Larry Fullerton, John Mrozek, Ruth Rodriguez, Michael Musgrave, Randy Alexander, Ron Younger, and George Doughty and against Plaintiff, Patricia Gallegos.

2. This civil action shall proceed against Defendant King Harris only. The Plaintiff is ordered to show cause within fifteen (15) days of the date of this Order why the three remaining claims under 42 U.S.C. §§ 1981, 1983, and 1985(3) against King Harris should not be dismissed as well. Failure to show cause within the prescribed time period will result in dismissal of this civil action without further notice.

DATED at Denver, Colorado, this 5th day of March, 1993.

BY THE COURT:

/s/ Daniel B. Sparr
Daniel B. Sparr
United States District Judge

UNITED STATES DISTRICT COURT
Office of the Clerk
District of Colorado

JAMES R. MANSPEAKER,
Clerk

Room C-145
United States Courthouse
1929 Stout Street
Denver, Colorado 80294
Phone (303) 844-3493
FTS 364-3433

Case No. 89-S-619

CERTIFICATE OF MAILING

I hereby certify that a copy of the ORDER GRANTING SUMMARY JUDGMENT signed by Judge Daniel B. Sparr and filed on March 5, 1993, was mailed on March 5, 1993, to the following:

Paul A. Baca, Esq.
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/s/ Judy L. Poor
Secretary/Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel B. Sparr

Civil Action No. 89-S-0619

PATRICIA A. GALLEGOS

Plaintiff,

v.

CITY AND COUNTY OF DENVER, et al.,

Defendants.

ORDER

(Filed APR 11 1991)

THIS MATTER came on for hearing before the court on April 5, 1991 on the Municipal Defendants' Motion for Summary Judgment and Defendant Harris's Motion for Summary Judgment. The court has reviewed motions, responses, the applicable law, has heard argument from counsel in open court, and is fully advised in the premises. The court incorporates herein its oral Findings and Conclusions made in open court on April 8, 1991 and ORDERS:

1. Plaintiff's pendent state claims, the Fifth, Seventh, Eighth, and Ninth Claims for Relief were DISMISSED on December 26, 1990.

2. Plaintiff's Sixth Claim for Relief was determined to be either a pendent state claim, in which case it is DISMISSED, or duplicative of and subsumed by the First Claim for Relief, in which case it is DISMISSED.

3. Plaintiff's Fourth Claim for Relief under Title VI is DISMISSED.

4. Defendant Harris's Motion for Summary Judgment is DENIED.

5. The Municipal Defendants' Motion for Summary Judgment is GRANTED IN PART AND DENIED IN PART.

1) Summary judgment is GRANTED on Plaintiff's First Claim for Relief as to Defendant City and County of Denver *only*.

2) Summary judgment is GRANTED on Plaintiff's Second Claim for Relief as to Defendant City and County of Denver *only*.

3) Plaintiff's Third Claim for Relief is alleged against Defendants Peña, Harris, and Roberts only (see First Amended Complaint, filed May 30, 1989). Summary judgment on Plaintiff's Third Claim for Relief is DENIED.

4) Defendant City and County of Denver is DISMISSED from this civil action.

DATED at Denver, Colorado, this 11th day of April, 1991.

BY THE COURT:

/s/ Daniel B. Sparr
Daniel B. Sparr
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel B. Sparr

Civil Action No. 89-S-0619

PATRICIA A. GALLEGOS
Plaintiff,

v.

CITY AND COUNTY OF DENVER, et al.,
Defendants.

MEMORANDUM OPINION AND ORDER
(Filed Dec 26, 1990)

THIS MATTER came on for hearing before the Court on the Municipal Defendants' Motion to Dismiss and Defendant Harris's Motion to Dismiss. The Court has reviewed the motions and briefs, the applicable law, has heard argument from counsel in open court, and is fully advised in the premises. The Court incorporates herein its oral Findings and Conclusions made in open court and ORDERS as follows.

I. Both Harris and the Municipal Defendants move to dismiss Plaintiff's First Claim for Relief for failure to state a claim under 42 U.S.C. Section 1981.

Section 1981 is restricted by its terms to preventing discrimination in the making and enforcement of contracts. *Patterson v. McLean Credit Union*, 109 S.Ct. 2363 (1989). It does not extend to conduct by the employer after the contract relationship has been established, including breach of the contract's terms or imposition of

discriminatory working conditions. Section 1981 does not extend beyond conduct by an employer that impairs an employee's ability to enforce through the legal process his or her established contract right. *Patterson* 109 S.Ct. at 2373.

The Plaintiff urges the Court to apply the recent decision in *Hicks v. Brown Group*, 902 F.2d 630 (8th Cir. 1990), however, the Court notes with approval Judge Fagg's dissent in *Hicks*. Although the Tenth circuit has not yet decided whether discriminatory discharge claims are still actionable under Section 1981 after *Patterson (See Hill v. Goodyear*, No. 89-3036 (10th Cir., Nov. 5, 1990); *Jackson v. City of Albuquerque*, 890 F.2d 225, 236 n. 15 (10th Cir. 1989); *Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1267 (10th Cir. 1989)), other circuits have found that discriminatory discharge claims are not actionable under Section 1981 after *Patterson*. *See Gonzalez v. Home Ins. Co.*, 909 F.2d 716 (2d Cir. 1990) (allegation of discriminatory quotas, discriminatory restrictions, and discriminatory harassment after agreement was entered into failed to state a claim under Section 1981 because there was no linking of the alleged discrimination to the making of the contract rather than to postformation performance); *McKnight v. General Motors Corp*, 908 F.2d 104 (7th Cir. 1990) (alleged discriminatory discharge did not implicate employee's right to make or enforce contract and, therefore, was not actionable under Section 1981); *Courtney v. Canyon Television & Appliance Rental, Inc.*, 899 F.2d 845 (9th Cir. 1990) (allegation that employer harassed and discharged employee because of his race was not actionable under Section 1981); *Lavender v. V & B Transmissions & Auto Repair*, 897 F.2d 805 (5th Cir. 1990) (racially discriminatory

termination was not actionable under Section 1981 as it involved neither the formation of a contract nor the opportunity to enter into a new contract). Other cases in this District have also held that racially motivated on-the-job harassment and termination from employment are beyond the scope of Section 1981 as construed in *Patterson*. *See Jiminez v. Lancaster Colony Corp.*, No 86-M-2482 (D.Colo. 1989) (Matsch, J.); *Malekian v. Pottery Club of Aurora, Inc.*, 724 F.Supp. 1279 (D.Colo. 1989); *Rivera v. AT & T Information Systems, Inc.*, 719 F.Supp. 962 (D.Colo. 1989).

In this Court's view, this case is controlled by *Patterson*. The conduct which Plaintiff alleges as racial harassment and discriminatory discharge is postformation conduct by the employer relating to the terms and conditions of continuing employment. This type of conduct is not actionable under Section 1981 because Section 1981 "prohibits discrimination only in the making and enforcement of contracts." *Patterson*, 109 S.Ct. at 2372.

However, the Plaintiff has alleged in her First Amended Complaint that the Defendants' actions precluded her from obtaining the Career Service Authority position that had allegedly been promised to her. This allegation states an actionable Section 1981 claim. Therefore, the Defendants' Motions to Dismiss Plaintiff's First claim for Relief are DENIED and the Plaintiff is limited to presenting evidence regarding whether the Defendants' actions prevented her from obtaining a new position in the Career Service Authority.

II. In addition, Defendants move to dismiss Plaintiff's Sixth Claim for Relief, a claim for denial of right to

contract. To the extent that the Sixth Claim restates Plaintiff's Section 1981 claim, it will be allowed to remain and the evidence will similarly be limited to whether the Defendants' actions prevented Plaintiff from obtaining a new position in the Career Service Authority. To the extent that the Sixth Claim is a pendent state claim, it will be treated in the same manner as the other pendent state claims are treated later in this Order at Paragraph V.

III. Defendants next move to dismiss Plaintiff's Second and Third Claims for Relief for failure to state a claim under Section 1983 and Section 1985. Plaintiff's First Amended Complaint specifically alleges that she was discriminated against based on her national origin and/or sex. (Paragraph 52). In addition, Plaintiff specifically alleges that Harris and the Municipal Defendants engaged in a conspiracy to discriminate against her and to prevent her from obtaining a position with the Career Service Authority. The allegation of a conspiracy against Harris is sufficient to state a claim that he was acting under color of state law. Even if it is doubtful that the Plaintiff will ultimately prevail, if the Plaintiff colorably states facts which, if proven, would entitle her to relief, a motion to dismiss for failure to state a claim for relief should not be granted.

The Municipal Defendants have also raised additional issues such as employment-at-will and qualified immunity as grounds for their Motion to Dismiss. These defenses are necessarily related to facts not yet established at the pleading stage and cannot properly be decided on a motion to dismiss.

Accordingly, the Defendants' motions to dismiss Plaintiff's Section 1983 and Section 1985 claims are DENIED.

IV. Next, the Defendants move to dismiss the Plaintiff's pendent state claims, the Fifth, Seventh, Eighth, and Ninth Claims for Relief. The Ninth claim for Relief is against the Municipal Defendants only.

It is well-established that the Court may exercise its sound discretion in determining whether to accept jurisdiction over pendent state claims. *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966). Consideration of the state law claims in conjunction with Plaintiff's title VI claim and the federal civil rights claims could well lead to jury confusion and will unnecessarily expand the scope of the trial. *Garcia v. Jefferson County, Colo.*, 687 F.Supp. 1498 (D.Colo. 1988). The Court, in its discretion, declines to exercise pendent jurisdiction over Plaintiff's state law claims. Plaintiff's Fifth, Seventh, Eighth, and Ninth Claims for Relief are hereby DISMISSED.

V. Finally, the Municipal Defendants move to dismiss Plaintiff's Title VI claim, the Fourth Claim for Relief, for failure to exhaust her administrative remedies.

Title VI was intended to halt federal funding of entities that violate prohibition of racial discrimination similar to that of the Constitution. To achieve these ends, Congress explicitly provided for an administrative enforcement mechanism, which allows the federal funding agency to attempt to secure compliance and, failing that, to terminate the violator's federal funding. Title VI does not provide a mechanism by which the class protected by the statute can actively participate in the

administrative process. Therefore, litigants need not exhaust their administrative remedies prior to bringing a Title VI claim in federal court. *Neighborhood Action Coalition v. Canton, Ohio*, 882 F.2d 1012, 1015 (6th Cir. 1989); *Doe on Behalf of Doe v. St. Joseph's Hospital*, 788 F.2d 411, 426 (7th Cir. 1986). Accordingly, the Municipal Defendants' Motion to Dismiss Plaintiff's Fourth claim for Relief is DENIED.

Accordingly, IT IS ORDERED that:

1. The Defendant's Motions to Dismiss Plaintiff's First Claim for Relief are DENIED and the Plaintiff is limited to presenting evidence of whether the Defendants' actions prevented her from obtaining a new position in the Career Service Authority.

2. The Defendants' Motions to Dismiss Plaintiff's Second and Third Claims for Relief are DENIED.

3. The Municipal Defendants' Motion to Dismiss Plaintiff's Fourth Claim for Relief is DENIED.

4. The Defendants' Motions to Dismiss Plaintiff's Fifth, Seventh, Eighth, and Ninth claims for Relief are GRANTED and Plaintiff's Fifth, Seventh, Eighth, and Ninth Claims for Relief are hereby DISMISSED.

5. To the extent that the Sixth Claim restates Plaintiff's Section 1981 claim, the Defendants' Motions to Dismiss Plaintiff's Sixth Claim are DENIED and the evidence will be limited to whether the Defendants' actions prevented Plaintiff from obtaining a new position in the Career Service Authority. To the extent that the Sixth Claim later raises the specter of a pendent state claim, it will be DISMISSED.

DATED at Denver, Colorado, this 26th day of December, 1990.

BY THE COURT:

/s/ Daniel B. Sparr
Daniel B. Sparr
United States District Judge

Supreme Court, U.S.
FILED
MAY 20 1993
OFFICE OF THE CLERK

No. 92-1687

In The

Supreme Court of the United States

October Term, 1992

o

Patricia A. Gallegos,

Petitioner,

v.

The City and County of Denver; Federico Peña; William Roberts; David Miller; Kathy Archuleta; Allegra Haynes; Kevin Marchman; Larry Fullerton; John Mrozek; Ruth Rodriquez; Michael Musgrave; Randy Alexander; Ron Younger; and George Doughty,

Respondents,

and King Harris,

Defendant.

o

Respondents' Brief in Opposition to Petition for Writ of *Certiorari* to The United States Court of Appeals for The Tenth Circuit

o

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May 1993

Questions Presented for Review

1. Whether discharge and termination claims are actionable under 42 U.S.C. § 1981 after the decision of the Supreme Court in *Patterson v. McLean Credit Union.*

2. Whether the correct standards were applied regarding the affirmative defense of qualified immunity.

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No. 92-1687

In The

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Patricia A. Gallegos,

Petitioner,

v.

The City And County Of Denver; Federico Peña; William Roberts; David Miller; Kathy Archuleta; Allegra Haynes; Kevin Marchman; Larry Fullerton; John Mrozek; Ruth Rodriquez; Michael Musgrave; Randy Alexander; Ron Younger; and George Doughty,

Respondents,

and King Harris

Defendant.

o

Respondents' Brief in Opposition to Petition for Writ of *Certiorari* to The United States Court of Appeals for The Tenth Circuit

o

The respondents respectfully request this Court to deny the petition for writ of *certiorari.*

CITATIONS FOR OPINIONS AND JUDGMENTS BELOW

The respondents are satisfied with the opinions of the courts below which are listed by the petitioner. However, not included is the date of the order issued in this case respecting rehearing as required by Rule 14 of the Rules of the Supreme Court. On February 17, 1993, the Tenth Circuit denied the petition for rehearing as untimely, and on March 1, 1993, a second motion to permit the filing of the petition for rehearing was denied.

STATEMENT OF THE CASE

Nature of the Case

In addition to the nature of the case submitted by the petitioner, the respondents provide the following supplementary information.

The respondents' motion to dismiss the first amended complaint raised the qualified immunity defense, among other claims. This claim was denied by the district court because "these defenses are necessarily related to facts not yet established at the pleading stage and cannot properly be decided on a motion to dismiss."

The respondents' motion for summary judgment reasserted the qualified immunity issue. During the summary judgment hearing, the court denied the qualified immunity defense, stating in part:

> COURT: ...I think when we start trying to sort out all those individual defendants, what I'll allow you to do is if they don't show any evidence which is sufficient to subject these individual defendants to liability, I'll entertain a motion for attorney's fees as to those individual defendants.
>
> I'm very concerned about--to use only as an example--the case against Randy Alexander. It appears

to me the only thing he ever did with respect to this plaintiff which had anything to do with her, with these claims, was make some comment with respect to her job performance. I can't remember exactly what it was, but it was a nondescript comment. As far--well, and perhaps I should say for purposes of this order, I did not address the issue of qualified immunity, because I think there are factual issues remaining there, so as to the qualified immunity issue, I know you addressed that in your motion. I'm denying the motion with respect to the qualified immunity...

COURT: ...As to the minor players, all they're going to suffer through is the inconvenience and mental problems of having to have their name on a lawsuit.

COURT: ...I'm leaving--I'm guess I'm erring in favor of the defendants--or the plaintiff's position that she be entitled to have an opportunity--have her day in court with regard to those 1981 claims. I don't know what theory he's got, where he says he can create a 1981 case on an expectation. I don't think there is any such theory, but I'm going to give him a chance to present it. If he doesn't find a theory between now and trial, I would suggest he'll probably scratch the 1981 case, but that's where we're going with this.

The Tenth Circuit Court of Appeals reversed this ruling upon appeal by the respondents.

Statement of the Facts

Patricia Gallegos was an appointee of former Mayor Federico Peña from January 5, 1987 until she was dismissed on April 11, 1988. She held a non-tenured political appointment. Originally her title was administrative assistant to the mayor, and on January 1, 1988, her title changed to deputy manager of

Public Works for Finance Administration. She was never a career service merit system employee.

The position of director of Affirmative Action, which the petitioner held, administered the city's minority business and women's business enterprise plans and compliance with Federal Aviation Administration regulations. The office implemented the provisions of Denver's ordinance setting aside contracts to qualifying minority and women-owned businesses. During the selection process in which Patricia Gallegos was hired, she was told how important it was for the director of Affirmative Action to work with the community. Shortly after Patricia Gallegos was hired, complaints were received about her ability to work with her staff, the community, and Hispanic, Black and other minority contractors. In September 1987, a meeting was held with Ms. Gallegos and the mayor's office at which time she was given ninety days to improve her performance and to respond to the community's complaints.

The petitioner claims that there was an agreement among the mayor, King Harris and Councilmember Bill Roberts to terminate her employment. According to the petitioner, she was told by Michael Heitzmann in April of 1987 that a deal had been struck between the mayor, Bill Roberts, King Harris and others which required the mayor to fire her in exchange for political support in the May 1987 mayoral election. The petitioner claims that she learned of this "agreement" when defendant Roberts stated to her, "we cut a deal, you're on your way out of here - the mayor promised us he is going to fire you." She also indicated that she learned of this from Ruth Rodriguez in January 1988.

Mayor Peña denied that he entered into any agreement with King Harris, Bill Roberts or anyone else to dismiss the petitioner from her position as the director of Affirmative Action. He acknowledged that each of those individuals complained about Ms. Gallegos' performance as did many other people in the administration and the community.

Bill Roberts also denies that there was any agreement with the mayor to terminate the petitioner from employment. He does note that he received numerous calls while a city councilman which were critical of her performance as director of Affirmative Action, from both Hispanic and Black contractors. Bill Roberts voiced his concerns about Patricia Gallegos to the mayor on a number of occasions. He wrote a letter to the mayor asking that Patricia Gallegos be removed because she was not administering her office in a reasonable and responsive manner. His letter references the crisis meetings with minority business people which had occurred because of Ms. Gallegos' administration of the office.

The purported sources of the "agreement" between the mayor and others to terminate Ms. Gallegos were Michael Heitzmann and Ruth Rodriguez. In Mr. Heitzmann's affidavit he states that he did inform Ms. Gallegos that there had been an agreement prior to Patricia Gallegos being hired, but it was to move Ron Younger from the Affirmative Action office to the Stapleton Airport office to be responsible for airport-related contract activity. As Ms. Gallegos' supervisor, Mr. Heitzmann instructed Ms. Gallegos to accomplish this staffing change, and she refused. Mr. Heitzmann indicated that he had no direct knowledge of any discussion between the mayor and Councilman Roberts or any agreement between the mayor or anyone else to dismiss Patricia Gallegos. In the affidavit of Ruth Rodriguez, she indicates there was no agreement with the mayor or others to terminate Ms. Gallegos in exchange for political support in the 1987 campaign. Ms. Rodriguez indicates she did not inform Ms. Gallegos of any such agreement since it did not exist.

Patricia Gallegos made the following allegations against the individual municipal respondents; and, in summary, each individual responded as stated below:

Randy Alexander

The petitioner claims that Mr. Alexander, a director in the Public Works Department, never invited her to his division staff meetings. The petitioner alleges that Mr. Alexander came to her office and told her that she was "acting petty" concerning her refusal to prequalify a minority contractor named Ulibarri. She also alleges that Randy Alexander advised her that she could spend $5,000 on furniture, but she decided to buy used furniture and only spent $100.

Randy Alexander asserts he repeatedly invited Patricia Gallegos to meetings and she chose not to attend. He denies any criticism of her refusal to prequalify a contractor. Mr. Alexander had no authority to hire or fire the petitioner.

Katherine Archuleta

The petitioner alleged that defendant Archuleta, who was then an assistant to the mayor, told her that she would "have to suffer the consequences" if she did not give a "strong" performance rating to defendant Younger. Ms. Archuleta denied this allegation.

George Doughty

The petitioner contended that airport director George Doughty gave her specific instructions that she should not be in attendance at a meeting with Bill Roberts. She also alleges that Mr. Doughty told her that Blacks were the only "real minorities".

In Mr. Doughty's affidavit, he explains that in an informal meeting with the Minority Contractors' Association, he remarked that in Cleveland where he had worked previously if you were not a Black in that political environment, you were not considered to be a minority. He denies telling Ms. Gallegos that she could not be in a meeting where Bill Roberts was present. Mr. Doughty had no authority to hire or fire the plaintiff.

Lawrence Fullerton

The plaintiff alleges that Lawrence (Larry) Fullerton, Deputy Manager of Public Works, did not invite her to a meeting regarding the Colorado Convention Center but instead invited one of her subordinates. The plaintiff attended this meeting anyway at which time she alleges that Mr. Fullerton made a remark which she interpreted as racially insulting. Mr. Fullerton apologized to Ms. Gallegos for his remark after learning she was insulted by it. He received a three day suspension from the Manager of Public Works for his remarks. Mr. Fullerton had no authority to hire or fire the plaintiff.

Allegra Haynes

Ms. Gallegos alleged that Allegra (Happy) Haynes, then an administrative assistant to the mayor, gave orders to her staff to certify certain minority contractors and carry out other demands. Allegedly, Ms. Haynes told Ms. Gallegos shortly after she was employed that she should not have been hired in the first place, and she should be responsive to various members of the community.

Ms. Haynes, who is presently a Denver City Councilwoman, took an interest in the Affirmative Action office because she had worked to create it and wanted to see that the original intent of the ordinance was carried out. Ms. Haynes had no authority to hire or fire the plaintiff.

Kevin Marchman

The petitioner contends that Kevin Marchman, then deputy chief of staff to the mayor and now the executive director of the Denver Housing Authority, demanded that she certify King Harris' firm as a minority contractor even though he failed to supply necessary income tax information. She indicates that Mr. Marchman contacted an airport official to obtain an extension of time for Harris to rectify a certification problem. She also alleges that Mr. Marchman stated to her in late 1987 that

he did not have to worry about her in the future because she would not be around much longer.

Mr. Marchman states that one of his first tasks when employed with the city in October 1987 was to meet with the representatives of the Black community. At that meeting he was advised that because of problems in the Affirmative Action Office, people in the Black community wanted Patricia Gallegos removed from the director's position. That problem continued.

Mr. Marchman said that after he had been with the city for a matter of weeks, he received a call from King Harris about problems in receiving his certification. Mr. Marchman did place a call to an airport official to see if the problem could be resolved. He never dealt directly with the contractor with whom Mr. Harris was having difficulties. He had no authority to hire or fire the petitioner.

David Miller

David Miller began working as Mayor Peña's chief of staff in August 1987. In September 1987, a meeting was held with Mr. Miller, Patricia Gallegos and the mayor regarding the concerns expressed by Councilman Bill Roberts in an August letter. Ms. Gallegos acknowledges the meeting, but denies that the parties who had made complaints against her were identified. Ms. Gallegos indicates that in December 1987 David Miller promised her a "career service position which would be requisitioned by my supervisor and submitted to the Career Service Authority for approval." Ms. Gallegos alleges that she met with David Miller on April 11, 1988 and was informed that if she did not resign from her position she would be fired and "they would make my life miserable."

Mr. Miller states that in September 1987 Ms. Gallegos was given a ninety day evaluation period to rectify the problems raised by Councilman Roberts and others concerning her public relations problems. In October 1987, Mr. Miller represented the mayor at the meeting of the Colorado Black Woman's Political

Caucus at which approximately two hundred people were in attendance. After a speaker gave a lengthy criticism of Patricia Gallegos and her relationship with the Black community, there was a standing ovation in the room. In December 1987, Mr. Miller was not satisfied that Ms. Gallegos had taken the initiative to meet with the public and address their concerns. After having received calls from members of the Hispanic community urging the mayor to remove Ms. Gallegos, he recommended to Mayor Peña that Ms. Gallegos be dismissed because she "had become a major liability to the administration and had shown no aptitude for addressing the problems" which had been described to her. Mr. Miller indicates that rather than dismissing Ms. Gallegos, the mayor reassigned her to a different political appointee position in the Department of Public Works. A discussion was held about attempting to move Ms. Gallegos into a career service position, and Ruth Rodriguez was to attempt that change.

In January, February and March 1988, David Miller received three or four communications from Michael Gallegos, a lawyer representing her sister Patricia Gallegos. These conversations related minor and petty problems Patricia Gallegos was having. On April 6, 1988, Michael Gallegos informed Mr. Miller that she would "go to the press" on April 8 if she did not receive a promise by noon on April 7 that Patricia Gallegos would be employed for one year, given a career service position, and receive a waiver of the probationary period or a retroactive career service employment date. This call was received one week before the filing deadline for recall petitions that were then circulating concerning the mayor, leading Mr. Miller to believe they were trying to take advantage of the administration's desire to avoid additional bad press. On April 11, 1988, Patricia Gallegos was informed by David Miller and Ruth Rodriguez that she must either resign or be fired. Mr. Miller denied that he ever told the petitioner that he would "make her life miserable" if she did not resign.

John Mrozek

Ms. Gallegos alleges that John Mrozek, former Manager of Public Works, accused her on April 7, 1988 of authorizing her sister to tell David Miller that she would go to the press if certain employment promises were not honored. John Mrozek verifies that he told the petitioner he would not be blackmailed, and she was free to make a statement to the press if she wished.

Michael Musgrave

Patricia Gallegos alleges that Mike Musgrave, then a deputy manager for the Department of Public Works, ordered her to give Ron Younger a "good" performance evaluation, and when she refused to do so, he told her that she would "suffer the consequences". She alleges that Mr. Musgrave intentionally excluded her from meetings and unfairly criticized her after she was reassigned to the position of Director of Contract Administration.

Mr. Musgrave relates in his affidavit that he had a meeting with Ms. Gallegos about how to deal with people because of severe morale problems in her office. Ms. Gallegos, according to Mr. Musgrave, got very emotional in these meetings and yelled loudly. Mr. Musgrave indicates that he never told Ms. Gallegos she would have to suffer the consequences for not giving Mr. Younger a good rating. Mr. Younger received a good rating because Career Service Authority rules required a good rating when an evaluation was filed late. Mr. Musgrave indicates he notified Ms. Gallegos of every meeting at which her presence was necessary.

Federico Peña

The petitioner complains that she was removed from the Office of Affirmative Action in December 1987 without an opportunity to remedy her deficiencies and without feedback on how to measure her performance. However, as an at-will employee, the petitioner could be terminated without cause. The petitioner alleges that there was a deal between Mayor Peña,

Bill Roberts, King Harris and others for the mayor to dismiss her from her employment in exchange for political support in the May 1987 mayoral election.

Mayor Peña totally rejects that accusation, noting that although Harris, Roberts and many others complained about Ms. Gallegos' performance, he ultimately dismissed her after her sister conveyed a threat to go to the press if Ms. Gallegos did not receive an immediate Career Service Authority position. Granting the petitioner an immediate tenured career service position would have violated Career Service Authority Rules and Denver's Charter. The mayor dismissed Ms. Gallegos for her performance problems and for making threats.

William (Bill) Roberts

The petitioner claims that there was an agreement among the mayor, King Harris and Bill Roberts to terminate her employment. The petitioner claims defendant Roberts stated to her that "we cut a deal, you're on your way out of here--the mayor promised us he is going to fire you."

Bill Roberts denies that there was any agreement with the mayor to terminate the petitioner from employment. Bill Roberts wrote a letter to the mayor asking that Patricia Gallegos be removed because she was not administering her office in a reasonable and responsive manner.

Ruth Rodriguez

The petitioner alleges that Ruth Rodriguez, then Deputy Manager of Public Works, dismissed her upon instructions from Mayor Peña. The petitioner alleges that Ruth Rodriguez harassed and unduly criticized her. She claims that Ruth Rodriguez failed to disclose meetings to her, refused to allow her to attend meetings, gave her short notice about meetings, and refused to give her sufficient staff or resources. She claims Rodriguez was overly critical of her refusal to pre-qualify a minority contractor. Ms. Gallegos says that Ruth Rodriguez would not return her phone calls. She complains that Ruth Rodriguez never initiated

the necessary paperwork to create a career service position for her.

Ms. Rodriguez responds that at the September 1987 meeting with Ms. Gallegos, it was explained to the petitioner that complaints were being received about her from the community and that she had ninety days to improve her performance. Ms. Rodriguez states that in 1988, because of a budget crunch, Ms. Rodriguez' own position as well as that of Allegra Haynes and Patricia Gallegos were earmarked in the budget as potential alternative positions to be cut in the event of drastic budget cuts. After Ms. Gallegos learned of this budget situation, she began a confrontational battle and threatened to go to the media.

Ms. Rodriguez indicated that she invited Ms. Gallegos to every meeting at which her presence was necessary, and that the petitioner received as much notice as possible for every meeting. Ms. Rodriguez notes that after Ms. Gallegos was transferred from Affirmative Action, she was so upset and angry about the situation that she let it affect her performance. Although arrangements were made for her to get a new office and furniture, Ms. Gallegos was never satisfied with anything concerning the move. Ms. Rodriguez states that there was a discussion about attempting to create a Career Service Authority position for the director of Contract Administration, but there was no guarantee that Ms. Gallegos would have the position. In the interim, when the budget department indicated that there needed to be large cuts in the Department of Public Works, there was no possibility of pursuing a career service position. No requisition for a position was ever filed nor did the petitioner apply for the position.

Ron Younger

The petitioner claims that Ron Younger, her subordinate in the Affirmative Action Office, was "extremely hostile and antagonistic" toward her. The petitioner complains that he failed to arrange for her furniture on her first day at work. She

alleges she found spoiled food in the filing cabinets. She asserts that he failed to carry out the assignments she gave him, and he would leave the office and fail to advise her of his whereabouts.

Mr. Younger states that Ms. Gallegos' attitude toward him was hostile from her first day on the job. Meetings were held with upper level management in an effort to work out the communication problems between Patricia Gallegos and Ron Younger. He indicates that Ms. Gallegos removed his furniture and dumped it on the floor of an adjacent office. Younger had no authority to hire or fire the petitioner, who was his supervisor.

SUMMARY OF THE ARGUMENT

The petition for certiorari should not be granted because the Tenth Circuit Court of Appeals properly found that the individual municipal respondents had qualified immunity, in accord with applicable decisions of this Court.

This Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), ruled that 42 U.S.C. § 1981 is restricted by its terms to preventing discrimination in the making and enforcement of contracts. Section 1981 does not extend to conduct by the employer after the contract relationship has been established, including breach of the contract's terms or imposition of discriminatory working conditions. Employment cases involving dismissal from employment are necessarily excluded from coverage under 42 U.S.C. § 1981.

The Tenth Circuit Court of Appeals also properly construed the decisions of this Court in determining that, as a matter of law, the individual respondents did not violate clearly established legal norms nor did the law clearly proscribe the actions the respondents took.

ARGUMENT I

THE DECISION OF THE SUPREME COURT IN *PATTERSON V. McLEAN CREDIT UNION* PRECLUDED CLAIMS FOR DISCHARGE FROM EMPLOYMENT UNDER 42 U.S.C. § 1981

Section 1981 is restricted by its terms to preventing discrimination in the making and enforcement of contracts. *Patterson v. McLean Credit Union,* 491 U.S. 164 (1989). It does not extend to conduct by the employer after the contract relationship has been established, including breach of the contract's terms or imposition of discriminatory working conditions. Section 1981 does not extend beyond conduct by an employer that impairs an employee's ability to enforce through the legal process his or her established contract right. *Patterson,* 491 U.S. at 177.

The petitioner urges the Court to apply the decision in *Hicks v. Brown Group,* 902 F.2d 630 (8th Cir. 1990), which she admits has been vacated and remanded *sub nom,* __ U.S. __, 112 S. Ct. 1255 (1992). On October 9, 1991, *Hicks v. Brown Group, Inc., supra,* was reversed by the Eighth Circuit Court of Appeals in light of its ruling in *Taggart v. Jefferson County Child Support Enforcement Unit,* 935 F.2d 947 (8th Cir. 1991) that discriminatory discharge claims are not actionable under 42 U.S.C. § 1981. 946 F.2d 1344 (8th Cir. 1991). The 1992 remand from this Court is to consider the case in light of the Civil Rights Act of 1991. 112 S. Ct. 1255 (1992).

Similarly, every appellate decision of the circuit courts of appeals which has reviewed this issue has determined that *Patterson, supra,* precludes such claims. See *Trujillo v. Grand Junction Regional Center,* 928 F.2d 973 (10th Cir. 1991); *Gonzalez v. Home Insurance Co.,* 909 F.2d 716 (2d Cir. 1990); *McKnight v. General Motors Corp,* 908 F.2d 104 (7th Cir. 1990), *cert.* denied, 11 S. Ct. 1306 (1991); *Courtney v. Canyon Television & Appliance Rental, Inc.,* 899 F.2d 845 (9th Cir. 1990); *Lavender v. V & B Transmissions & Auto Repair,* 897

F.2d 805 (5th Cir. 1990); *Williams v. First Union Nat'l Bank*, 920 F.2d 232 (4th Cir. 1990); *Prather v. Dayton Power & Light Co.*, 918 F.2d 1255 (6th Cir. 1990); *Patterson v. Intercoast Management of Hartford, Inc.*, 918 F.2d 12 (2d Cir. 1990); *Thompkins v. Dekalb County Hosp. Auth.*, 916 F.2d 600 (11th Cir. 1990).

The cases cited by the petitioner in the first argument of her petition for *certiorari* do not state the law on this issue. The petitioner cites a number of cases for the proposition that *Patterson v. McLean Credit Union, supra,* does not preclude actions involving discriminatory discharge or termination from employment. She cites *Booth v. Terminix International, Inc.*, 722 F. Supp. 675 (D. Kan. 1989) and *Birdwhistle v. Kansas Power and Light Company,* 723 F. Supp. 570 (D. Kan. 1989). Both of these decisions were made by the same Kansas district court judge. However, neither of these cases is good law within the Tenth Circuit, of which Kansas is a member, in light of the Tenth Circuit's ruling in *Trujillo v. Grand Junction Regional Center, supra,* two years after the *Booth* and *Birdwhistle* decisions. The case of *Jackson v. City of Albuquerque,* 890 F. 2d 225 (10th Cir. 1989), in which the petitioner refers to an ambiguous footnote, is also controlled by *Trujillo*. For the same reason, *Carroll v. Elliott Personnel Services,* 51 F.E.P. Cases 1173 (D. Md. 1989) is no longer the state of the law in the Fourth Circuit in light of *Williams v. First Union National Bank, supra,* decided in 1990. Another case cited by the petitioner, *Gamboa v. Washington,* 716 F. Supp. 353 (N.D. Ill. 1989), is no longer the law in the Seventh Circuit in light of *McKnight v. General Motors Corp., supra,* decided in 1990. The final case cited by the petitioner for this proposition, *Vance v. Southern Bell,* 863 F.2d 1503 (11th Cir. 1989), to which the petitioner again points to a footnote, has been overshadowed by the Eleventh Circuit decision in *Thompkins v. DeKalb County Hospital Authority,* supra, some two years later.

Two other cases cited by the petitioner in support of her argument are *Greggs v. Hillman Distributing Co.*, 719 F. Supp.

552 (S.D. Tex. 1989), and *Hall v. County of Cook*, 719 F. Supp. 721 (N.D. Ill. 1989). *Greggs* does not stand for the proposition for which it is cited by the petitioner. *Greggs v. Hillman Distributing Co., supra,* does not hold that *Patterson* "did not intend to change existing precedent allowing (termination) claims under § 1981." To the contrary, *Greggs* states that:

> Considering the Supreme Court's interpretation of the terms 'make' and 'enforce' in *Patterson,* however, this Court concludes, as a matter of law, that claims of racially motivated discharge without more are outside the scope of Section 1981.

719 F. Supp. at 554.

Nor does *Hall v. County of Cook,* supra, stand for the proposition for which it is cited in the petitioner's brief at page 15. Rather, *Hall v. County of Cook, supra,* holds that "plaintiff's discharge from employment is beyond the scope of Section 1981 as construed in *Patterson.*" 719 F. Supp. at 724. Thus, these cases are consistent with their circuits' decisions: *Lavender v. V & B Transmissions and Auto Repair, supra;* and *McKnight v. General Motors Corp., supra.*

The petitioner makes a separate argument that discharge claims are actionable under 42 U.S.C. § 1981 as actions to "enforce a contract." This argument was plainly rejected by this Court in *Patterson.* In *Patterson,* the Court stated:

> Nor is it correct to say that racial harassment amounting to a breach of contract impairs an employee's right to enforce his contract. To the contrary, conduct amounting to a breach of contract under state law is precisely what the language of § 1981 does not cover. That is because, in such a case, provided that plaintiff's access to state court or any other dispute resolution process has not been impaired by either the State or a private actor, (cite omitted), the plaintiff is free to enforce the terms of the contract in state court, and cannot

> possibly assert, by reason of the breach alone, that he has been deprived of the same right to enforce contracts as enjoyed by white citizens.

491 U.S. at 183.

The petitioner also argues in her second argument that discharges motivated by racial animus remain actionable under 42 U.S.C. § 1981. In the cases where the circuit courts of appeals have held that discharges were not actionable, cited *infra,* the courts did not distinguish their decisions on the motivation underlying the dismissal. For example, in *McKnight v. General Motors Corp., supra,* where the discharge of the plaintiff was alleged to be based upon race and in retaliation for having filed claims of racial discrimination, the court barred this claim from being raised under 42 U.S.C. § 1981, regardless of motivation. Similarly in *Courtney v. Canyon Television & Appliance Rental, Inc., supra,* the plaintiff alleged that his termination was the result of racial discrimination. Again the court found this claim could not be raised under 42 U.S.C. § 1981. Since § 1981 only protects discrimination based on race, the rulings of all of the circuit courts of appeals that dismissals may not be challenged under this statute necessarily encompasses discharges motivated by race. Again the district court cases cited by the petitioner have been superseded by the later circuit court of appeals' rulings precluding termination actions discussed above. The one circuit court of appeals' decision cited by the petitioner, *Rathjen v. Litchfield,* 878 F.2d 836, 841 (5th Cir. 1989) does not hold that discharges motivated by racial animus remain actionable under § 1981. To the contrary, *Rathjen v. Litchfield, supra,* which addresses freedom of speech claims, questions whether § 1981 claims for retaliation survive *Patterson,* and simply finds it inapposite.

ARGUMENT II

THE PROPER STANDARDS REGARDING QUALIFIED IMMUNITY WERE APPLIED ON APPEAL

The district court denied the motion to dismiss filed by the respondents concerning qualified immunity claiming its resolution was based on facts not yet established at the pleading stage. The respondents then requested summary judgment on those claims which was also denied by the district court. The court chose not to address those defenses until trial even though the court was skeptical that the petitioner had stated a cause of action against many of the respondents.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), two presidential aides were alleged to have participated in a conspiracy to violate the constitutional and statutory rights of the plaintiff in recommending his dismissal from employment. The Court discussed the immunity to which government officials are entitled against suits for damages, and emphasized the need for early resolution of this immunity:

> Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief ..., it should not survive a motion to dismiss. Moreover, the Court recognized in *Scheuer* the damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity ....
>
> In responding to such a motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits.

Harlow, 457 U.S. at 808, citing *Butz v. Economou*, 438 U.S. 478, 507-508 (1978).

The Court found there was no distinction between suits brought against state officials under 42 U.S.C. § 1983 and suits brought directly under the Constitution against federal officials. *Harlow*, 457 U.S. at 809.

The Court recognized the claim should be dismissed early in the process to avoid the societal costs

> of the expenses of litigation, the diversion of official energy from pressing public issues and the deterrence of able citizens from acceptance of public office, (and)... the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible (public officials), in the unflinching discharge of their duties.'

Harlow, 457 U.S. at 814.

The Court held that "bare allegations of malice" should not result in either a trial or discovery, and that officials

> performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Harlow, 457 U.S. at 818.

The Court set the standard for review on summary judgment and indicated that a court may determine not only the currently applicable law, but whether the law was clearly established at the time an action occurred. Until the immunity issue is resolved, no discovery should be allowed. *Ibid.*

In *Mitchell v. Forsyth*, 472 U.S. 511 (1985), the Supreme Court discussed the standards for an appellate court reviewing the denial of the defendants' claim of qualified immunity. The Court determined that the appellate court

> need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions or, in cases where the district court has denied summary judgment for the defendant on the ground that even under the defendant's version of the facts the defendant's conduct violated clearly established law, whether the law clearly proscribed the actions the defendant claims he took.

Mitchell, 472 U.S. at 528.

More recently, in *Siegert v. Gilley*, 500 U.S. __, 111 S. Ct. 1789 (1991), the Supreme Court again analyzed the proper framework for determining whether a plaintiff's allegations are sufficient to overcome a defense of qualified immunity as asserted in a motion for summary judgment. *Siegert*, 111 S.Ct. at 1793. Plaintiff Siegert was a clinical psychologist who had been terminated from a federal government facility. After his forced resignation from the hospital, his former supervisor sent a letter in response to a credential check describing Dr. Siegert as inept and unethical. Dr. Siegert filed a *Bivens* claim against this supervisor alleging infringement of his liberty interest in violation of the due process clause of the Fifth Amendment. When the supervisor filed a motion to dismiss under qualified immunity contending that Siegert's allegations did not state the violation of any clearly established constitutional right, the district court declined to decide the summary judgment motion until further discovery was allowed. Citing *Harlow*, the Supreme Court found error in allowing the case to go forward without having performed the necessary analysis of the qualified immunity claim.

> A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is "clearly established" at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all.

Siegert, 111 S.Ct. at 1793.

The Court found that Siegert's claim of injury to his reputation was not a liberty interest protected under the Fourteenth Amendment. *Siegert*, 111 S.Ct. at 1794. Qualified immunity barred the claim because there was no clearly established federal statutory or constitutional protection. The plaintiff did not meet his burden to overcome the defense of qualified immunity asserted by the defendants.

Whether the action of a government official violates clearly established statutory or constitutional rights generally turns on the "objective legal reasonableness" of the action. *Anderson v. Creighton*, 483 U.S. 635 (1987). Whether that right was clearly established "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right... It is to say that in the light of pre-existing law the unlawfulness must be apparent." 483 U.S. at 640. The application of the protection requires cautious fact-specific analysis. Justice Scalia wrote for the Court:

> The operation of this standard, however, depends substantially upon the level of generality at which the relevant "legal" rule is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory provision. But if the test of "clearly established

> law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. *Harlow* would be transformed from a guarantee of immunity into a rule of pleading.

Anderson, 483 U.S. at 639.

"As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs,* 475 U.S. 335, 341 (1986). If officers of reasonable competence could disagree on this issue, immunity should be recognized. *Malley, supra.* Contrary to the district court's inclination in the case at issue to give the petitioner an opportunity to come up with a theory by trial, the Supreme Court requires that the petitioner have that theory, and her facts, on hand and scrutinized as to each individual respondent at the time of the summary judgment ruling on qualified immunity.

The Tenth Circuit Court of Appeals has frequently reviewed summary judgment decisions involving a qualified immunity defense. In those decisions, that court has recognized that "once a defendant raises a qualified immunity defense, the plaintiff bears a heavy burden." *Hannula v. City of Lakewood,* 907 F.2d 129, 130 (10th Cir. 1990). In *Hannula,* the court stated:

> ... (o)nce a defendant raises a qualified immunity defense the plaintiff assumes the burden of showing that the defendant has violated clearly established law. To overcome the defense, the plaintiff must do more than identify a clearly established legal test and then allege that the defendant has violated it. See *Pueblo Neighborhood,* 847 F.2d at 645. The plaintiff must demonstrate a substantial

> correspondence between the conduct in question and prior law allegedly establishing that the defendant's actions were clearly prohibited.
> ... If the plaintiff fails to meet the burden of showing how a defendant violated a clearly established right, we must prevent the plaintiff from subjecting government officials to trial: (quotation omitted).
> If the plaintiff fulfills the burden of showing how the defendant violated a clearly established right, the defendant then bears the normal burden of a movant for summary judgment of demonstrating that no material facts remain in dispute.

Hannula, 907 F.2d at 131.

The plaintiff thus bears the burden of proving that the law was clearly established. *Pueblo Neighborhood Health Centers v. Losavio,* 847 F.2d 642, 645 (10th Cir. 1988). The trial court has an obligation in resolving the motion for summary judgment in which qualified immunity has been raised to "identify the law upon which it relied and state the basis for its conclusion on whether or not the defendant's alleged conduct violates the law and that the law was clearly established when the alleged violation occurred." *Pueblo Neighborhood, supra,* at 646. In this case, the trial court completely abdicated its responsibility to identify the clearly established law and to show how each of the defendants' conduct violated that law.

With respect to the petitioner's claims under 42 U.S.C. § 1981, the trial court properly ruled that the petitioner is limited to showing whether the respondents' actions prevented her from obtaining a new career service position. Thus, no clearly established law was violated in Ms. Gallegos' dismissal.

The petitioner also claims her dismissal violates 42 U.S.C. § 1981 because the mayor received comments from a member of city council and from citizens concerning her poor performance and acted upon it. Yet for an employee terminable at will, political input by the mayor's constituency regarding

her employment is not a contractual violation. In *Baden v. Koch,* 799 F.2d 825 (2nd Cir. 1986), a case concerning the dismissal of a chief medical examiner who was an appointee of the mayor, the Second Circuit found that the medical examiner had no property right in continued employment and could not challenge the critical statements made about him by various people. The court weighed the mayoral appointee's interest against the government interest:

> New York City's interest is in the ability of its executive officer to respond promptly and effectively to complaints about a high level official who is serving at the executive's discretion. Preserving that ability is plainly important to the functioning of government. The creation of such discretionary posts by the legislature is a recognition that quick adjustments among top personnel may sometimes be necessary for the executive branch to continue to do its job. Indeed, in giving the executive the power to make such personnel changes, the legislature also imposes a duty to do so. An executive who fails to act when the facts demand action will often be taken to task by the legislature, the media and the public for the continued shortcomings of his subordinates. In deciding what procedures are constitutionally required when such adjustments are made, therefore, we must not unnecessarily hinder municipal executives in their ability to make these important personnel decisions.

799 F.2d at 831-832.

Ms. Gallegos again failed to meet her obligation to show the clearly established constitutional right which was violated by the respondents with respect to her "conspiracy" allegation.

The petitioner appears to argue, too, that § 1981 protects her "rights to equal employment opportunity," but this premise too has been disclaimed by the Supreme Court in *Patterson.*

Allegations of racial harassment under Title VII are not synonymous with a § 1981 claim.

> The plaintiff's ability to plead that the racial harassment "is severe or pervasive" should not allow him to bootstrap a challenge to *conditions of employment (actionable, if at all, under Title VII) into a claim under § 1981,* that the employer refused to offer the petitioner the 'same right to ...make' a contract. We think it clear that the conduct challenged by petitioner relates not to her employer's refusal to enter into a contract with her, but rather to the conditions of her employment (emphasis added).

491 U.S. at 184-185.

Complaints about her furniture, her invitation to meetings, her treatment on the job all are claims at best described as racial harassment which clearly is precluded under § 1981.

The petitioner's claims against each of the individual respondents concern actions in the nature of racial harassment or a breach of contract. Since those claims are not cognizable under § 1981, it also follows that the individual respondents did not violate any clearly established statutory rights of the petitioner under § 1981.

The petitioner has failed to meet her burden under *Hannula, supra,* to show that the respondents have violated clearly established law by demonstrating a substantial correspondence between the conduct in question and prior law establishing that the respondents' actions were clearly prohibited.

The petitioner also claimed she was entitled to a job as a tenured merit system employee, which required a distinct recruitment process dictated by municipal administrative regulations. In *Patterson, supra,* the Supreme Court noted that a refusal to enter into a new contract is actionable under § 1981. This Court indicated that the petitioner in *Patterson* bore the

burden of proving a *prima facie* case of discrimination by proving

> by a preponderance of the evidence that she applied for and was qualified for an available position, that she was rejected, and that after she was rejected respondent either continued to seek applicants for the position, or, as is alleged here, filled the position with a white employee. (Cite omitted.)[7]
>
> [7]. Here, respondent argues that petitioner cannot make out a *prima facie* case on her promotion claim because she did not prove either that respondent was seeking applicants for the intermediate accounting clerk position or that the white employee named to fill that position in fact received a 'promotion' from her prior job. Although we express no opinion of the merits of these claims, we do emphasize that in order to prove that she was denied the same right to make and enforce contracts as white citizens, petitioner must show, *inter alia,* that she was in fact denied an *available* position. (Emphasis in the original.)

Patterson, 105 L.Ed.2d at 157.

Denver's Charter is clear that the plaintiff's status was that of an employee at will:

> The mayor shall appoint the heads of all administrative departments, and shall appoint all commissions, boards and officers, under his control; and said appointees shall hold said appointments so long as their services are satisfactory to the mayor.

Denver Charter § C5.20

An employee who is hired in Colorado for an indefinite period of time is an "at-will employee" whose employment may be terminated by either party without cause and without notice,

and whose termination does not give rise to a cause of action. *Continental Airlines, Inc. v. Keenan,* 731 P.2d 708, 711 (Colo. 1987).

Since the petitioner was an at-will employee, she had no contract of employment with the City and County of Denver. The petitioner claims she had been promised a career service merit system position. She did not apply for such a job, and all career service employees serve a probationary period prior to obtaining tenure in a position. *Hunter v. Manager of Safety of City and County of Denver,* 657 P.2d 456 (Colo. App. 1982). The petitioner admitted that the creation of a career service position for her would include a standard career service probation period. She also understood that the creation of a position was subject to the approval of the Career Service Authority.

"Employment with ...Denver... is governed by the provisions of the Denver City Charter." *Spickard v. Civil Service Commission,* 31 Colo. App. 450, 505 P.2d 32 (1972). The plaintiff's claim to a career service position is premised on an alleged agreement with the mayor to put her in a career service job. Assuming, *arguendo,* that this alleged agreement existed, it was illegal. The creation of a career service position cannot be accomplished without following the appropriate regulatory procedures. The record established that in order to create a career service position, it must be approved by the Career Service Authority. A requisition has to be submitted, after which analysts determine the appropriate classification and salary. After a position is created and approved, the position is announced publicly and applications are accepted. The Career Service Authority determines whether the applicants meet the qualifications. An examination is held for the position. After the examination, the top five candidates are sent to the appointing authority for interview. Under Denver's Charter, a non-career service employee cannot be placed in a career service position without submission of an application or going through a competitive examination procedure.

The plaintiff cannot ignore the legal limitations which bind public officials. *Keeling v. City of Grand Junction,* 689 P.2d 679 (Colo. App. 1984); *Driggins v. City of Oklahoma City,* 954 F.2d 1511, 1515 (10th Cir. 1992), *cert.* denied, 113 S. Ct. 129 (1992). One who contracts with a municipality is charged with knowledge of its limitations and restrictions in making contracts. The existing law at the time and place of the making of the contract, including the city charter, becomes a part of the contract. *Keeling, supra.* The petitioner had actual knowledge of the limitations of the career service system. The alleged agreement between the plaintiff and the mayor was "one positively condemned by law." *Berkeley Metropolitan District v. Poland,* 705 P.2d 1004, 1008 (Colo. App. 1985). See also *Meyer v. Buffalo Park Development Co.,* 44 Colo. App. 52, 607 P.2d 401 (1980); *Normandy Estates Metropolitan Recreation District v. Normandy Estates, Ltd.,* 191 Colo. 292, 553 P.2d 386 (1976). Patricia Gallegos did not apply for a Career Service Authority position, nor was she rejected. There was no available Career Service position because it was never created. The city never continued to seek applicants for a position; it never sought applicants for any such job. No position was filled. No requisition for the position was submitted. No classification was created. The position was never advertised. No one ever applied for the position. No examination was held to screen the applicants. No candidates were interviewed for the position. The plaintiff simply cannot show the existence of a *prima facie* case for a claim for failure to hire or promote under 42 U.S.C § 1981.

A claim seeking personal liability under § 1981 also must be predicated on the actor's personal involvement. *Allen v. Denver Public School Board,* 928 F.2d 978, 983 (10th Cir. 1991). The petitioner has the burden of proof to causally connect the actor with the discriminatory action. *Allen, supra.* There is no evidence in the record that respondents Younger, Fullerton, Marchman, Alexander, Haynes, Archuleta, Musgrave or Doughty had any personal involvement in the decision to terminate the plaintiff or to fail to create a new position. There

is no viable § 1981 claim against these respondents which can withstand a defense of qualified immunity. If the petitioner premises her § 1981 claim on her termination or on failure to create a new job, only the mayor had the authority to remove her from any exempt position. Denver Charter § C5.20. Only the manager of public works has the authority to appoint her to a career service position within the Department of Public Works. Denver Charter § A2.2. None of the other city respondents possess this authority. The petitioner failed to meet her burden of proof of coming forward with specific factual allegations supporting her contention that the respondents' actions were guided by impermissible motives. *Coen v. Runner,* 854 F.2d 374, 378 (10th Cir. 1988).

CONCLUSION

The petitioner did not meet her burden of proof to show that the law clearly established a constitutional right to her position with the city nor did she show a violation of any constitutional right at all.

Under *Patterson v. McLean Credit Union,* her 42 U.S.C. § 1981 claim based upon dismissal from employment fails to state a cause of action. The individual respondents are entitled to qualified immunity on the petitioner's claim under 42 U.S.C. § 1981 that a merit system position should have been created for her since she cannot show that any such position ever existed. A promise to create such a position is merely a future expectation, and unenforceable under Denver's Charter. There was no showing that the conduct of the government officials violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald, supra.* The ruling of the Tenth Circuit Court of Appeals does not conflict with any decision of another court of appeals and is in accord with decisions of this Court. The respondents respectfully request that the petition for writ of *certiorari* be denied.

Respectfully submitted,

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